Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1994

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors,

Petitioners,

vs.

Seattle-First National Bank and SeaFirst America Corporation,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

This case arises from petitioners' challenge, based on this Court's decision in *Holywell Corp. v. Smith*, 112 S. Ct. 1021 (1992), to a bankruptcy court's order confirming a plan of reorganization. However, the question presented is whether the court of appeals improperly dismissed this appeal on the grounds that "substantial consummation" of the plan of reorganization had rendered the appeal moot. In particular, the following issues arise:

1. Did the court of appeals err in deciding that it could not grant relief by narrowly fashioning the relief granted, thereby avoiding wholesale revision of the plan?

2. Did the court of appeals err in refusing to remand the case for the limited purpose of allowing the petitioners to conduct discovery on the mootness issue?

3. Did the court of appeals' dismissal of this appeal on mootness grounds, despite petitioners' numerous, repeated requests for a stay, violate the due process principle of "fundamental fairness" as well as the "fresh start" policy of the Bankruptcy Code?

LIST OF PARTIES

The following is a list of all of the parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed:

Petitioners:

Clinton Manges

Duval County Ranch Company

Man-Gas Transmission Company

Respondents:

Seattle-First National Bank

SeaFirst America Corporation

None of these parties has parent companies or subsidiaries within the meaning of Supreme Court Rule 29.1.

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In the
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Clinton Manges, Duval County Ranch Company,
and Man-Gas Transmission Company, Debtors,

Petitioners,

vs.

Seattle-First National Bank and
SeaFirst American Corporation,

Respondents.

TO THE UNITED STATES SUPREME COURT:

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company ask this Court to issue a writ of certiorari to review the opinion issued August 29, 1994, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND JUDGMENTS BELOW

Petitioners have reproduced in a separate appendix the opinions and judgments which the courts below have issued. The opinions and judgments are as follows:

In re Manges (Manges v. Seattle-First National Bank), 29 F.3d 1034 (5th Cir. 1994) (decision of court of appeals on appeal from the district court).

Manges v. Seattle-First National Bank, No. C-91-208 (S.D. Tex. May 4, 1993) (decision of the district court on appeal from the bankruptcy court).

In re Duval County Ranch Co., No. 89-01286-C-11; No. 89-01532-C-11; No. 89-01531-C-11 (Bankr. S.D. Tex. June 10, 1991) (bankruptcy court order confirming plan).

JURISDICTION

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company each filed a petition for relief pursuant to chapter 11 of the United States Bankruptcy Code. The bankruptcy court had jurisdiction to entertain those petitions pursuant to 28 U.S.C.A. § 157 (West 1993).

The court of appeals issued its opinion on August 29, 1994. On September 27, 1994, the court of appeals denied the debtors' petition for rehearing. Pursuant to 28 U.S.C.A. § 1254(1) (West 1993), this Court has jurisdiction to review the decision of the court of appeals.

STATUTES INVOLVED

11 U.S.C.A. § 1127(b) (West 1993):

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

STATEMENT OF THE CASE

Duval County Ranch Company ("Ranch Company") owned the surface estate of a ranch in Duval County, Texas, and Man-Gas Transmission Company ("Man-Gas") owned the mineral estate. These two companies were wholly owned by Clinton Manges; Manges and these two companies were thus known as "the Manges debtors."

Seattle-First National Bank made a loan to the Ranch Company which was secured by a mortgage on the surface estate and was personally guaranteed by Manges. The loan went into default, and Seattle-First filed suit against Ranch Company and Manges. The parties settled the dispute by executing an agreed judgment pursuant to which Ranch Company and Manges were to make periodic payments on the loan. Manges and the Ranch Company failed to make one of the scheduled loan payments, and at that point Ranch Company filed a voluntary chapter 11 bankruptcy petition to prevent the foreclosure which the agreed judgment permitted. Soon thereafter, Manges and Man-Gas also filed chapter 11 proceedings.

The bankruptcy court lifted the automatic stay so as to allow the foreclosure, thereby facilitating a sale of the ranch estate to SeaFirst America Corporation, a wholly-owned subsidiary of Seattle-First. A U.S. district court issued an order confirming the sale under the foreclosure provisions of the agreed judgment.

Several times during the course of the bankruptcy proceedings, the Manges debtors proposed their own plan of reorganization. The bankruptcy court rejected each of these proposed plans, and so Seattle-First and SeaFirst ultimately proposed a plan highly favorable to them.

Under this creditors' plan, a liquidating trust would be created to acquire and hold legal title to the debtors' assets — principally the surface and mineral estate of the Duval County ranch property. The proceeds from the sale of these assets were to be distributed to various creditors, the primary beneficiaries of the trust being Seattle-First and SeaFirst. Seattle-First and SeaFirst were to set up a fund for satisfaction of the unsecured creditors.

Although SeaFirst had purchased the ranch property at the prior foreclosure, the plan provided that upon the confirmation of the plan, the prior foreclosure would be rescinded, putting title to the ranch property back in the hands of Man-Gas and the Ranch Company. The plan required the Manges debtors to implement the plan by conveying that property to the liquidating trust.

The most notable provisions of the plan were those provisions designed to ensure that the liquidating trust would be a non-taxable grantor trust. The apparent intent of Seattle-First and SeaFirst was that the plan follow the contours of the Eleventh Circuit's erroneous decision in *Holywell Corp. v. Smith*, 911 F.2d 1539 (11th Cir. 1990), *rev'd* 112 S. Ct. 1021 (1992). Thus, the plan proposed that the trust not be held liable for any taxes resulting from the sale of the debtors' property. In fact, the plan expressly provided that the trustee was under no duty to file federal tax returns, pay income taxes of any kind, or make trust assets or sale proceeds available to satisfy the tax claims. Instead, the plan expressly provided that the resulting tax liability was to be satisfied by Clinton Manges personally.

Before this Court had reversed the Eleventh Circuit decision in *Holywell Corp. v. Smith*, the bankruptcy court issued an order confirming the creditors' plan.

The Manges debtors appealed from the bankruptcy court's confirmation order, and they asked the bankruptcy court to stay implementation of the plan. The bankruptcy court denied the request. The Manges debtors then asked the district court for a stay, but the district court also declined to stay implementation of the plan. The Manges debtors then sought a writ of mandamus from the court of appeals to compel the district court to issue the stay. The court of appeals denied that request.

Seattle-First and SeaFirst urged the district court to dismiss the appeal as moot, but the district court declined to do so. It concluded that "substantial consummation" of the plan had not yet occurred because the most substantial asset owned by the debtors — the ranch property — had not been sold. On the merits, the district court affirmed the bankruptcy court's confirmation order.

The Manges debtors then appealed to the court of appeals. Two days after filing their notice of appeal, the Manges debtors requested and the district court denied an emergency stay of the district court's order affirming the bankruptcy court's confirmation order. The court of appeals denied a similar motion for stay a week later. Several months after that, and based on discovery obtained in the interim, the Manges debtors filed an amended motion to stay implementation of the plan pending appeal, but the court of appeals denied that motion also.

As a result, numerous transactions occurred during the appeal. The liquidating trustee sold working interests, executed oil & gas leases and gas purchase contracts, and leased the surface estate for grazing and hunting purposes. Before oral argument, the trustee also allegedly sold the ranch property and the remaining mineral interests.

At that point, Seattle-First and SeaFirst urged the court of appeals to dismiss the appeal as moot. In reply, the Manges debtors asked the court to remand the case to the district court for discovery on the mootness issue. The Manges debtors argued that the appellate record did not show whether the buyers of the ranch property had notice of the pending litigation and whether these buyers would be harmed by modification of the plan of reorganization. As such, the Manges debtors asked that they be allowed to conduct discovery to present controverting evidence regarding the mootness issue. The court of appeals denied this request.

In their brief on appeal, the Manges debtors argued that the tax provisions violated this Court's decision in *Holywell Corp v. Smith,* 112 S. Ct. 1021 (1992). In *Holywell* this Court found that the burden of filing tax returns and paying taxes on trust income of a liquidating trust such as this rested upon the trustee rather than on the debtor. At oral argument, in response to questions from the panel, the Manges debtors proposed that at a minimum the court could grant appropriate relief by simply striking the tax provisions in the plan, without rewriting or dismantling the plan. *In re Manges (Manges v. Seattle-First Nat'l Bank*, 29 F.2d 1034, 1043 n.13 (5th Cir. 1994).

Relying primarily on uncontroverted evidence that the trustee had finally sold the ranch property, evidence that the Manges debtors had no effective opportunity to rebut, the court of appeals concluded that substantial consummation of the plan had occurred and that the court therefore was unable to grant any effective relief. The court therefore dismissed the appeal as moot.

ARGUMENT

I. The Fifth Circuit erred in dismissing the appeal on mootness grounds.

The Fifth Circuit's decision to dismiss on mootness grounds was based primarily on the idea that the ranch had been sold and that the court could not fashion any appropriate relief without undoing this sale and several other transactions, action that would result in harm to interests of third parties. This conclusion was wrong because the remedy that the Manges debtors ultimately requested would not require wholesale revision of the plan and would not have adversely affected third parties not before the court. The court could have ordered that the narrow provisions imposing on Manges the tax liability resulting from the trust's sale of property be stricken. Such relief would not have harmed third parties and would have left the sale and the plan intact.

Substantial consummation does not ipso facto moot an appeal of the plan. *See In re Block Shim Dev. Co.,* 939 F.2d 289, 291 (5th Cir. 1991). Substantial consummation will not moot the appeal so long as (1) the court can still order effective relief; (2) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (3) such relief will not unravel intricate transactions and thus create an unmanageable situation for the bankruptcy court; (4) the parties who will be adversely affected by modification of the plan receive notice of the appeal and an opportunity to participate in the appeal; and (5) the appellant has pursued with diligence all available remedies to obtain a stay of the implementation of the plan. *See In re Chateaugay Corp. (Frito-Lay, Inc. v. LTV Steel Co.),* 10 F.3d 944, 952-53 (2nd Cir. 1993).

As should be apparent, mootness in this context does not directly implicate classic "case or controversy" concerns of article III of the Constitution. Rather, the concept of "mootness" with regard to consummation of the plan of reorganization addresses equitable concerns unique to bankruptcy. Thus, even if "substantial consummation" means the court can no longer restore all parties to the positions they used to occupy, the case remains live if the court "can fashion some form of meaningful relief." *See, e.g., In re UNR Indus., Inc.*, 20 F.3d 766, 768 (7th Cir. 1994) (citing *Church of Scientology v. United States*, 113 S. Ct. 447, 450 (19[illegible]), *cert. denied sub nom. UNARCO Bloomington Factory Workers v. UNR Indus., Inc.*, 63 U.S.L.W. 3381 (Nov. 14, 1994); *In re 1515 Broadway Assocs., L.P. (New York City Dep't of Fin. v. 1515 Broadway Assocs., L.P.)*, 153 Bankr. 400, 405-06 (S.D.N.Y. 1993). Thus, the reviewing court should evaluate each claim for relief from the plan to determine whether modification of the plan is feasible and equitable. *See, e.g., UNR Indus., Inc.*, 20 F.3d at 768; *Chateaugay*, 10 F.3d at 954; *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir.), *vacated in part*, 797 F.2d 1004 (D.C. Cir. 1986); *In re Texaco Inc. (Trans World Airlines, Inc. v. Texaco Inc.)*, 92 Bankr. 38, 46 (S.D.N.Y. 1988).

For example, the court in *AOV Industries* examined separately each request for relief. Although the court determined that many claims were moot, it concluded that two claims were not, despite substantial consummation of the plan. The court noted that all parties that could be affected by these two claims were before the court, and the court's decision would have no adverse impact on the interests of non-party creditors. *AOV Indus.*, 792 F.2d at 1149. In *In re Chateaugay*, the court similarly concluded that substantial consummation of the plan had not mooted

Frito-Lay's claims for indemnity because at least some effective relief could be granted. *See Chateaugay,* 10 F.3d at 952-55. In short, whether the court can fashion any effective relief, without adversely affecting those not involved in the appeal, is the critical issue.

The principal thrust of the Manges debtors' appeal was their objection to the discrete provisions of the plan which imposed on Manges the tax liability arising from the liquidating trustee's sale of the property of the estate — provisions directly contrary to this Court's decision in *Holywell Corp. v. Smith*, 112 S. Ct. 1021 (1992). Thus, in the face of a mootness challenge, the court of appeals had a duty to determine whether it could strike the provisions of the plan shifting this tax liability, without creating an unmanageable situation for the bankruptcy court or third parties affected by this relief.

The court of appeals decided, however, that striking the objectionable portions of the plan was not possible. *In re Manges (Manges v. Seattle-First Nat'l Bank*, 29 F.2d at 1043 n.13. Asserting that the tax provision was integral to the plan as implemented, and reiterating the talisman of "substantial consummation," the court of appeals reasoned that section 1127(b) of the Bankruptcy Code simply would not permit it to grant the limited relief requested. *Id.*

The court's conclusion is wrong for two principal reasons. First, the Manges debtors ultimately limited their request for relief to the striking of limited portions of the plan which would have affected only the parties before the court. Granting this relief would not have upset the plan in its entirety, but would simply have shifted the liability for taxes from Manges to the liquidating trust, where it normally would have been. This would not have affected

the purchasers from the trust, nor would it have affected the unsecured creditors and the fund created to satisfy their claims. Instead, it would only have affected Manges and the appellees, Seattle-First and SeaFirst.

The court's suggestion that the Manges debtors had proposed "piecemeal dismantling" of the plan obscures the court's actual logic. *Id.* The Manges debtors proposed no such "piecemeal dismantling" of the plan. Instead, they suggested the simple removal from the plan of provisions imposing on Manges the tax liability resulting from sale of estate property by the trust. That such relief may have made the plan unpalatable for Seattle-First and SeaFirst would not make the situation unmanageable for the court below. Neither the sale to the third-party purchasers, nor the distributions to unsecured creditors, nor the leases and contracts on the ranch property would need to be undone. Nothing in the opinion suggests that the court of appeals really analyzed whether striking the tax provision would require it to undo any transactions pursuant to the plan.

Second, the court of appeals was wrong in believing section 1127(b) to be applicable in this context. Section 1127(b) does not limit a court of appeals' ability to review the plan for errors that can be corrected without rewriting the entire plan. *See UNR Indus.*, 20 F.3d at 769; *see also In re A.J. Mackay Co. (Bill Roderick Distribution, Inc. v. A.J. Mackay Co.)*, 50 Bankr. 756, 760 (D. Utah 1985). It only addresses the power of the bankruptcy court to modify a plan after confirmation. In short, a reviewing court has the duty to "scrutinize each individual claim, testing the feasibility of granting relief against its potential impact on the reorganization plan as a whole." *AOV Indus., Inc.*, 792 F.2d at 1148. "Substantial consummation is not a blanket discharge of this judicial duty to examine carefully each

request for relief." *Id.* Section 1127(b) thus does not limit the duty of the court of appeals to determine whether the lower courts erred in approving a plan of reorganization or whether appropriate relief is feasible.

Seattle-First and SeaFirst argued that the tax provision was an integral part of the plan and that they would not have agreed to the plan absent the tax provision. However, Seattle-First and SeaFirst proposed the plan. Any adverse consequences resulting from the striking of the tax provision should be borne by the plan proponents. Further, no good faith purchasers or innocent third parties will be affected by removing the tax provision from the plan. Nor will striking the tax provision of the plan require the unraveling of intricate transactions that have already taken place. Seattle-First and SeaFirst are essentially the only beneficiaries of the liquidating trust. Shifting the tax liability from the debtors to the liquidating trust will only affect Seattle-First and SeaFirst. It will not affect any other persons involved in the distribution of the Manges, Man-Gas, and Ranch Company assets.

In short, the Manges debtors satisfied the standard for avoiding a mootness determination. *In re Chateaugay Corp.*, 10 F.3d at 952-53. They showed that the court of appeals could order effective relief without unravelling intricate transactions, that they had diligently pursued a stay, and that all parties affected by such relief were before the court. The court of appeals' decision to dismiss the appeal anyway demonstrates that the court's analysis fails to comport with the standard that other circuits have followed in deciding the mootness issue.

II. The Fifth Circuit should have remanded the Manges debtors' appeal for the limited purpose of conducting discovery on the mootness issue.

At the very least, the court of appeals should have remanded this appeal to the bankruptcy court to permit the Manges debtors to obtain the discovery they needed to challenge the affidavits and documentary evidence offered by Seattle-First and SeaFirst to prove up a bona fide sale of the ranch property.

As part of the mootness/substantial consummation analysis, courts look to see whether the requested relief will affect good faith purchasers or persons who are not parties to the appeal. *See, e.g., Chateaugay,* 10 F.3d at 953. Seattle-First and SeaFirst filed numerous affidavits and documents which purported to show that the ranch had been sold in a good faith transaction. The Manges debtors asked that they be allowed to conduct discovery to examine the evidence offered by Seattle-First and SeaFirst regarding the sale of the ranch, and to gather evidence to determine whether the ranch was sold in good faith. The court of appeals denied this request, yet in its opinion the court criticized the Manges debtors for not having offered evidence to controvert the evidence that Seattle-First and SeaFirst had offered.

Courts of appeals have remanded appellate matters to lower courts while retaining jurisdiction of the appeal in many situations. *See Easley v. University of Michigan Bd. of Regents,* 853 F.2d 1351, 1358 (6th Cir. 1988) (court of appeals remanded for evidentiary determination necessary to decide appeal); *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.,* 768 F.2d 189, 190 (7th Cir. 1985) (ordering a remand because the appellate record did not adequately

reflect the existence of diversity jurisdiction); *In re American Ready Mix, Inc. (Lopez v. Behles)*, 14 F.3d 1497, 1500 (10th Cir.) (disputed facts regarding a party's standing may required a remand), *cert. denied*, 115 S. Ct. 77 (1994).

Reviewing courts have also found it necessary to remand cases for additional proceedings while retaining appellate jurisdiction to evaluate mootness issues. *See Huddleston v. Nelson Bunker Hunt Trust Estate,* 102 Bankr. 71, 75-77 (N.D. Tex. 1989). In *Huddleston,* to support a contention that the appeal was moot, appellees sought to supplement the record with affidavits purporting to show the extent to which the plan of reorganization had been implemented. The court recognized that to permit such supplementation would require it to provide the appellant with an opportunity to challenge the affidavits. The court found that "when the controlling evidence [on mootness] is disputed, the better course is to remand the issue to the bankruptcy court to consider any appropriate evidence, to supplement the appellate record accordingly, and to enter findings of fact and conclusions of law." *Huddleston,* 102 Bankr. at 76 (citing *A&S Liquidating Co. v. Carter,* 465 F.2d 359, 360 (5th Cir. 1972); *see In re Hamady Bros. Food Markets (Durant Enters., Inc. v. Creditors Comm.),* 110 Bankr. 815, 818 (E.D. Mich. 1990) (following *Huddleston*).

Indeed, the court of appeals even recognized that problems may arise when the party opposing a motion to dismiss on mootness grounds contests the newly submitted evidence as done by the Manges debtors. *See Manges,* 29 F.3d at 1041. Nonetheless, the court concluded that it could, with impunity, rely upon the documents offered by Seattle-First and SeaFirst, regardless of whether Manges had had an opportunity to contest that testimony. *See id.*

The court should have allowed the Manges debtors to take discovery, because that was the only way to give them any meaningful opportunity to address the mootness issue with respect to the sale of the ranch.

III. Dismissal of the appeal violated due process and "fresh start" considerations.

The court of appeals' decision also merits review by this Court because it is contrary to traditional due process considerations as well as the fresh start principles of the Bankruptcy Code.

After confirmation of a plan of reorganization, a party choosing to challenge the bankruptcy court's order should seek a stay pending appeal to avoid a mootness issue. Consequently, when reviewing courts are asked to determine issues of mootness, they often look to whether the appellant sought the imposition of a stay pending appeal. Several courts have indicated that whether the appellant diligently pursued a stay is an important factor to be considered when deciding mootness issues. *See, e.g., Chateaugay,* 10 F.3d at 954-55; *In re Public Service Co. (Rochman v. Northeast Util. Serv. Group)*, 963 F.2d 469, 472 (1st Cir.), *cert. denied*, 113 S. Ct. 304 (1992); *Block Shim,* 939 F.2d at 291; *In re Roberts Farms, Inc. (Trone v. Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981); *Hamady Bros.,* 110 Bankr. at 817-18; *In re Texaco*, 92 Bankr. at 45. The failure to secure a stay, however, is not dispositive of the mootness issue. *AOV Indus, Inc.,* 792 F.2d at 1147.

In this case, the Manges debtors sought at every available opportunity the imposition of a stay pending the outcome of this appeal. At each turn, the stay was denied. Nevertheless, the appeal was dismissed for the very reason the stays were sought, i.e., to avoid a dismissal on grounds of mootness. While stays are routinely denied and appeals dismissed as moot, this case may demonstrate more clearly than most the inequitable results of such a practice. It strikes at the heart of due process considerations in that it effectively denies parties the right to appellate review.

The idea of due process arises from the American ideal of fairness. *See generally Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Peterson v. Garvey Elevators, Inc.,* 850 P.2d 893, 897 (Kan. 1993). Under circumstances such as this appeal, those who diligently pursue a stay at every step will be at the mercy of those implementing the bankruptcy plan. Thus, parties who diligently pursue the imposition of a stay will be in no better position than a party who made no effort to secure a stay. These parties will (1) be unable to stop the implementation and/or subsequent substantial consummation of a confirmed plan, (2) inevitably have the case dismissed for mootness, and (3) routinely be denied appellate review, just like the Manges debtors.

This Court has recognized that in certain instances appellate review is necessary despite mootness when the case is "capable of repetition yet evading review." *See Southern Pac. Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). The creation of the "capable of repetition yet evading review" exception was necessary to avoid the harsh consequences flowing from dismissal on mootness grounds in situations where the appellant had no control over the existence of a live controversy. This case and others like it warrant the creation of a similar exception. Be they

debtors or creditors, neither party will be able to challenge the erroneous confirmation of a reorganization plan if the courts can deny reasonable requests for a stay and allow substantial consummation to moot the appeal. Debtors, like Manges, will therefore emerge from the bankruptcy proceeding having been denied their right to appellate review, a right that should be guaranteed pursuant to the due process clause of the Fourteenth Amendment.

In addition to this denial of due process, debtors like Manges will not emerge from bankruptcy with a "fresh start," but instead with hundreds of thousands of dollars in tax liability. One fundamental purpose of a bankruptcy proceeding is to afford the debtor a "fresh start." *In re Riso (Snoke v. Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992). While a debtor's right to a fresh start must be balanced against a creditor's right to be paid, the Bankruptcy Code intends that the debtor emerge free of debt following the bankruptcy proceeding, and with enough property to begin again. *See In re Grosso,* 51 Bankr. 266, 269-70 (Bankr. D.N.M. 1984). When these two principles conflict, the interest in providing the debtor with a fresh start rarely takes the back seat. *See id.* at 270. Accordingly, Seattle-First and SeaFirst, the plan's proponents, should bear the risk of an erroneous confirmation by the bankruptcy court.

In this case, the court of appeals ignored the fresh start policy and the due process issues raised by this case. The courts' denials of the Manges debtors' requests for a stay, and the court of appeals' ultimate dismissal of this appeal as moot, combine to effect a fundamental violation of due process. Neither the Bankruptcy Code nor the federal courts' equitable doctrine of mootness should be construed to allow such results.

CONCLUSION

For these reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Appendix to
Petition for Writ of Certiorari

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No. 93-7328.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

In the Matter of Clinton MANGES, Debtor. Clinton MANGES, Duval County Ranch C and Man-Gas Transmission,
Appellants-Cross Appellees,
v.
SEATTLE-FIRST NATIONAL BANK and SeaFirst American Corporation, Appellees-Cross Appellants.

In the Matter of DUVAL COUNTY RANCH C,
Debtor.
Clinton MANGES, Duval County Ranch C and Man-Gas Transmission, Appellants-Cross Appellees,
v.
SEATTLE-FIRST NATIONAL BANK and SeaFirst American Corporation,
Appellees-Cross Appellants (Two Cases).

In the Matter of MAN-GAS TRANSMISSION,
Debtor.

Aug. 29, 1994.

Before KING and SMITH, Circuit Judges, and KENT* District Judge:

*District Judge of the Southern District of Texas, sitting by designation.

*KING, Circuit Judge:

Appellants, the debtors in a consolidated bankruptcy proceeding, appeal from he district court's order affirming the bankruptcy court's confirmation of the principal creditor's proposed plan of reorganization. By way of cross-appeal, the creditors request that we dismiss the appeal as moot. On the basis of the facts before us, we agree with the creditors and, upon finding the issues presented to be moot, dismiss the appeal.

I. Background

Appellant Duval County Ranch Company (the "Ranch Company") owned the surface estate of a 99,000-acre ranch in Duval County, Texas. Appellant Man-Gas Transmission Company ("Man-Gas") owned the mineral rights under the ranch property. Both of these companies were wholly owned by the individual debtor and appellant, Clinton Manges ("Manges").[1] The ranch was undisputedly and by far the largest asset of the Manges debtors. Seattle First National Bank ("Seattle") made a loan to the Ranch Company in 1980, which was secured by a mortgage on the ranch surface estate and personally guaranteed by Manges.

A. The Agreed Judgement and Foreclosure

The loan went into default, and Seattle filed suit against the Ranch Company and Manges in the United States District Court for the Western District of Texas, San Antonio Division, to recover the sums owned. Eventually,

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[1]Collectively, we refer to these appellants as the "Manges debtors."

in August of 1988, the parties entered into an agreed judgment pursuant to which the Ranch Company and Manges would make periodic payments on the loan.

After the Ranch Company and Manges subsequently failed to make one of the scheduled payments under the agreed judgment, the Ranch Company filed a voluntary Chapter 11 bankruptcy petition to prevent foreclosure under the agreed judgment. Soon after, Manges and Man-Gas also entered Chapter 11 proceedings.

Seattle requested relief from stay, but agreed to abandon that request temporarily if certain conditions were met. The court signed an "Agreed Order On Motion for Relief From Stay" on September 5, 1990. Pursuant to the order, the Manges debtors were to obtain insurance coverage for improvements to the ranch within ten days of the order's entry. When the Ranch Company failed to obtain the requisite binder for coverage within the agreed time-period, Seattle gave notice of default. After the Ranch Company received the notice and failed to cure the default, the automatic stay was lifted, and the San Antonio court entered an order of sale of the ranch property on October 30, 1990. Although this order was stayed temporarily, the ranch was eventually sold at auction by federal marshals on January 16, 1991 (the "January 16 foreclosure"), and was purchased by SeaFirst American Corporation ("SeaFirst"), a wholly-owned subsidiary of Seattle. The San Antonio court confirmed the sale on

January 17, 1991, and the Manges debtors appealed both the order of sale and confirmation of sale to this court.[2]

B. The Plan of Reorganization

The Manges debtors proposed several plans of reorganization, but the bankruptcy court refused to confirm any of the debtors' proposed plans. Instead, by order entered June 10, 1991, the bankruptcy court confirmed the plan proposed by Seattle and SeaFirst (the "Plan") after the balloting and a four-day confirmation hearing. In connection with the confirmation order, the bankruptcy court issued findings of fact and conclusions of law, including the following: (i) that the Plan complied with all requirements of 11 U.S.C. §§ 1123 and 1129, as well as other applicable law; (ii) that the Plan "was proposed in good faith and not by any means forbidden by law"; (iii) that "[t]he principal purpose of the [ ] Plan is not the avoidance of taxes ..."; and (iv) that the debtors had "no equity in any of the property of the estates subject to the liens."[3]

Under the Plan, a liquidation trust would be created to hold legal title to the debtors' assets for sale and distribution of proceeds to the various creditors (the "Trust"). The Plan appointed a vice-president of Seattle to

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[2] We dismissed that appeal as moot after the bankruptcy court confirmed the creditor plan of reorganization as discussed below.

[3] With respect to this finding, the bankruptcy court further decreed that "[t]he value of the secured claims shall be determined by the sales price for the collateral."

serve as liquidating trustee, overseeing the payment of approximately $80 million in creditors' claims with approximately $35 million in trust assets. The Manges debtors were required to execute the trust agreement creating the Trust as well as a "blanket conveyance" transferring all of their assets to the Trust. In the event the Manges debtors failed to do so, third parties were authorized to execute the appropriate documents. The Plan also provided that, upon its confirmation, the January 16 foreclosure would be rescinded and all liens existing prior to the foreclosure would be reinstated. Another important aspect of the Plan was that SeaFirst would create a $1.3 million creditor fund to pay administrative expenses, priority wage claims, and general unsecured claims. Additionally, SeaFirst voluntarily subordinated its estimated $36 million unsecured claim to those of the remaining unsecured creditors, and Seattle and SeaFirst waived their approximately $1.7 million administrative expense claims.

With respect to tax consequences, the Plan specifically provided that the Trust would be a non-taxable grantor trust--i.e., that the Trust would not be liable for any taxes resulting from the sale of property, The Plan included an express provision that the trustee was under no duty to file federal tax returns or to pay income taxes of any kind. Nor was the trustee obligated to make available trust assets or sale proceeds to satisfy the tax claims. The IRS, one of the Manges' creditors, at first lodged objections, but, during the confirmation hearings, withdrew any objections it had to the Plan. Interestingly, the bankruptcy court, in its June 10 findings and conclusions, specifically found that "[t]here should not be any significant postconfirmation income tax liability to Manges due to the availability of tax attributes, the value

of the collateral, the availability of subchapter S termination,[4] and the lack of personal liability to Manges for [the Ranch Company's] taxes."[5]

C. The Appellate Efforts

The Manges debtors took an appeal from the confirmation order to the district court and unsuccessfully applied for a stay of the Plan pending appeal from both the bankruptcy court and the district court. They also sought a writ of mandamus from this court to compel the district court to issue the stay, but that request was similarly denied. Seattle and SeaFirst urged that district court to dismiss the appeal as moot, but the district court refused, concluding that the Plan had not been substantially consummated. Specifically, the court, below found that the most substantial asset of the debtors--the ranch property--had not been sold, though it recognized that a substantial amount of the Trust property had otherwise been alienated. Reaching the merits, the district

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[4] Although Man-Gas was created as a subchapter S corporation, and consequently tax liabilities could be funnelled through to its owner, Manges, the bankruptcy court deferred entry of its written confirmation order so that Manges could convert Man-Gas to a subchapter C corporation, thus immunizing him from personal liability.

[5] The bankruptcy court further observed that "[e]ven in the event that the debtors are faced with post-confirmation tax liability, the [ ] Plan is not unfair or inequitable since the debtors have had the benefit of the prepetition use of money and property without the burden of paying taxes."

court affirmed the confirmation order by order entered May 4, 1993 (the "May 4 order").

The Manges debtors then commenced the instant appeal. Two days after filing their notice of appeal, on May 14, 1993, the Manges debtors sought and were denied an emergency stay from the district court of its May 4 order pending appeal to this court. This court denied a similar motion for stay on May 25, 1993. On September 7, 1993, the Manges debtors filed an amended motion to stay the Plan pending appeal, but that motion was also denied a week later.

D. The Administration of the Trust

As a consequence of the failure to obtain a stay, numerous events have taken place pursuant to the Plan. The Trust has been created, and, soon after the Plan was confirmed, SeaFirst funded the creditor fund, much of which was subsequently disbursed to administrative claimants and priority wage claimants. According to affidavits filed in the district court while the first tier of this appeal was before the court, the Trust paid over $1.5 million in creditors' claims and over $2.5 million in repairs and operating expenses relating to the ranch property. Those affidavits also reflect that the Trust litigated several unsecured claims and was poised to distribute fifty percent of the remaining monies to the allowed, general unsecured creditors by the time of the district court appeal. The Trust additionally sold working interests, executed oil and gas leases, entered into gas purchase contracts, and leased almost all of the surface area of the ranch for grazing and hunting purposes. It began reducing significant ad valorem tax liabilities which had not been paid for years.

Most significant, however, is the fact that the ranch property and all remaining mineral interests have been sold to non-creditor third parties as of December 16, 1993 (the "December 16 sale"), during the pendency of this appeal. Although we are not informed of what additional, administrative measures have been taken during the course of this appeal, we can only presume that the trustees have continued to implement the unstayed Plan.

II. Analysis

The Manges debtors claim that the Plan as confirmed deprives them of their ability to have a "fresh start" because they will be saddled with significant post-confirmation tax liabilities and will have no estate assets with which those liabilities can be satisfied. Seattle and SeaFirst counter that the controversy is moot because the Plan has been so substantially consummated that this court can no longer provide effective relief.

[1][2][3][4][5][6][7] Generally, the mootness inquiry centers upon the concern that only live cases or controversies be decided by our courts. *See Powell v. McCormack*, 395 U.S. 486, 496 n.7, 89 S.Ct. 1944, 1951 n. 7, 23 L.Ed.2d 491 (1969) (recognizing that the Court's inability to consider the merits of a moot case "is a branch of the [U.S. CONST. art. III] constitutional command that the judicial power extends only to cases or controversies") (citing *Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1912, 20 L.Ed.2d 917 (1968)). A controversy becomes moot in the traditional sense when, as a result of intervening circumstances, there are no longer adverse parties with sufficient interests to maintain the litigation. *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993). Many courts, including our own, however, have

employed the concept of "mootness" to address equitable concerns unique to bankruptcy proceedings.[6] In this context, "mootness" is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions. *See In re AOV Indus., Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986) (recognizing that "[e]ven when the moving party is not entitled to dismissal on article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits") (citations omitted). Consequently, a reviewing court may decline to consider the merits of a

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[6] *See, e.g., In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (recognizing the virtually universal principal that "a plan of reorganization, once implemented, should be disturbed only for compelling reasons" and collecting cases); *Rochman v. Northeast Util. Serv. Group (In re Public Serv. Co.)*, 963 F.2d 469, 471-72 (1st Cir.) (noting that the mootness doctrine facilitates the "important public policy favoring orderly reorganizations and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court' ") (quotation omitted), *cert. denied*, --- U.S.---, 113 S.Ct. 304, 121 L.Ed. 2d 226 (1992); *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981) (holding that reversal of the confirmation order "would knock the props out from under the authorization for every transaction that has taken place, [and] would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court").

confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available--even though there may still be a viable dispute between the parties on appeal. *Halliburton Serv. v. Crystal Oil Co. (In re Crystal Oil Co.)*, 854 F.2d 79, 82 (5th Cir. 1988); *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 406-07 n. 1 (5th Cir. 1985). The Eleventh Circuit cogently described the competing interests which must be considered in this regard:

> The test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him.

First Union Real Estate Equity and Mort. Inv. v. Club Assoc. (In re Club Assoc.), 956 F.2d 1065, 1069 (11th Cir. 1992) (citation omitted). The concept of "mootness" from a prudential standpoint protects the interests of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented. As the Seventh Circuit aptly framed the issue, we must determine "whether it is prudent to upset the plan of reorganization at this late date." *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

[8] This court has historically examined three factors in making this assessment--(i) whether a stay has been obtained, (ii) whether the plan has been "substantially consummated," and (iii) whether the relief

requested would affect either the rights of parties not before the court or the success of the plan. *Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.)*, 939 F.2d 289, 291 (5th Cir. 1991) (citing *Crystal Oil*, 854 F.2d at 81-82); *Cleveland, Barrios, Kingsdorf & Casteix v. Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994).[7] We evaluate each in turn.

A. Halting the Runaway Train: the Motions to Stay

[9][10] As the Manges debtors correctly observe, in many of the cases in which bankruptcy appeals were dismissed as moot, the appellants failed to seek a stay. *E.G., Crystal Oil*, 854 F.2d at 82 (noting the objecting creditor "should have sought a stay so the reviewing court could consider the plan's propriety before implementation led third parties to make commitments in reliance on the plan"); *Cleveland, Barrios*, 166 B.R. at 286-87 (observing that the failure to seek a stay warrants dismissal of appeal on mootness grounds if the lack of stay has permitted a comprehensive change in circumstances or substantial consummation of the plan); *see also Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981) (dismissing an appeal on equitable grounds where appellant never applied to bankruptcy court for stay). By contrast, the Manges debtors argue, they diligently--albeit unsuccessfully--pursued a stay at every

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[7] The Eleventh Circuit, in a recent opinion on the subject, listed an additional inquiry--whether the relief sought would affect the reemergence of the debtor as a revitalized entity. *See First Union Real Estate Equity and Mort. Inv. v. Club Assoc. (In re Club Assoc.)*, 956 F.2d 1065, 1069 n. 11 (11th Cir. 1992).

turn.[8] Thus, they appear to conclude, they have preserved their right to a merits review. However, in rejecting a similar argument, Judge Easterbrook aptly pointed out that the failure to seek a stay is not "a censurable event to be punished by refusal to adjudicate the merits"; rather,

> [t]he significance of an application for a stay lies in the opportunity it affords to hold things *in stasis*, to prevent reliance upon the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision on appeal puts a cloud over the plan of reorganization and

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[8] The district court denies the debtors' request for a stay because it was not persuaded that the Manges debtors had the requisite likelihood of success on appeal. The bankruptcy court more fully elaborated its grounds for denial of stay, reasoning that, even if execution of the Plan were stayed, overwhelming circumstances would compel it to lift the automatic stay to allow foreclosure upon the estate's assets. Because foreclosure upon the debtors' assets would leave little to be divided among the remaining claimants, the bankruptcy court concluded that the most fair and equitable result was to confirm the Plan and deny the stay.

> derivatively over the assets of the reorganized firm.

In re UNR Industries, 20 F.3d at 769-70; *see also In re AOV Indus., Inc.,* 792 F.2d 1140, 1147 (D.C. Cir. 1986) (recognizing that unsuccessful attempt to obtain stay had same result as failure to seek stay). In short, the failure or inability to obtain a stay pending appeal carries the risk that review might be precluded on mootness grounds.

Although we recognize that, in many situations, the reviewing court's decision whether to grant a stay is essentially dispositive of the case--considering the average length of time for an appeal[9]--we note that several provisions of the Bankruptcy Code preordain such a consequence. *See, e.g.,* 11 U.S.C. § 363(m) (mandating that the reversal of an unstayed order authorizing the sale or lease of estate property "does not affect the validity of the sale or lease under such authorization to an entity that purchased or leased such property in good faith ... unless such authorization and such sale or lease were stayed pending appeal"); 11 U.S.C. § 1127(b) (curtailing significantly bankruptcy court's ability to modify plan of reorganization after its confirmation and "substantial consummation"); *see also* Bankruptcy Rule 805 ("Unless an order approving a sale of property ... is stayed pending appeal, the sale to a good faith purchaser...shall not be affected by the reversal or modification of such order on

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[9] *See In Re UNR Industries*, 20 F.3d at 768 (noting that "[t]he long delay between the bankruptcy court's confirmation of the plan and the district court's disposition of objections to that action laid the foundation for the conclusion that the plan is beyond challenge").

appeal, whether or not the purchaser knows of the pendency of the appeal."). As the Ninth Circuit recognized in *In re Roberts Farms,* "the principle of dismissal of an appeal for lack of equity ... places a heavy burden on aggrieved party-appellants in bankruptcy cases. It is justified to prevent frustration of orderly administration of estates under various provisions of the Bankruptcy Act." 652 F.2d at 798. It is undisputed that the Manges debtors did not obtain a stay, and we must thus examine the transactions which have taken place as a consequence to determine whether the confirmation challenge has become equitably or prudentially moot.

B. Unscrambling the Eggs: Substantial Consummation

"Substantial consummation" is a statutory measure for determining whether a reorganization plan may be amended or modified by the bankruptcy court. 11 U.S.C. § 1127(b).[10] This court, in addressing the mootness issue, has borrowed the "substantial consummation" yardstick because it informs our judgment as to when finality

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[10] The statutory definition of "substantial consummation" is as follows: "[S]ubstantial consummation" means--(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan. 11 U.S.C. § 1101(2). The district court focused only upon subpart (A) of the test in denying the motion to dismiss, and the parties appear to dispute only that requirement.

concerns and the reliance interests of third parties upon the plan as effectuated have become paramount to a resolution of the dispute between the parties on appeal. *E.g., Block Shim*, 939 F.2d at 291; *accord Club Associates*, 956 F.2d at 1069.

The district court concluded that the Plan had not been "substantially consummated," and, as a result, the relief sought was not moot. The principal basis for this conclusion was the fact that the ranch had yet to be sold at the time the district court entered its order. Of course, that event has now occurred, and we must determine as a threshold matter whether we may properly incorporate the December 16 sale into our mootness analysis. If so, we will then evaluate the effect the sale has upon that determination, in addition to the other transactions which are contended to evidence substantial consummation of the Plan.

1. Evidence of the December 16 sale

The Manges debtors have long recognized the significance of this transaction and the consequent effect it would have on the mootness question. In fact, in requesting a stay during the pendency of this appeal, they represented that:

> The trustee is currently involved in negotiations to sell the property, having received written offers to purchase the property. An order preventing such sale is necessary to prevent the sale from rendering moot the appellants' appeal. ***A sale of this property would leave the bankruptcy estate with***

> ***few assets and would render this appeal moot*** (emphasis added).

As noted above, this court denied the stay.

[11] Now that the ranch has been sold and the threat of mootness looms larger, the Manges debtors challenge the December 16 sale--apparently for the first time--on the basis that there is no evidence that the sale was made to a good-faith third-party purchaser, a requirement that they contend has been incorporated into the first prong of the substantial consummation determination. They also speculate that "discovery ***could conceivably reveal*** ... that [the sale] was not a good faith transfer for value, or was conditioned on the outcome of this appeal" (emphasis added). Reasoning from that assumption, the debtors argue that the recent sale ***might be*** subject to rescission in the event their appeal was successful. Therefore, the Manges debtors previously asked that we remand the case to the district court for discovery on the mootness issue; however, this court denied the request. Although we recognize that the "substantial consummation" test is generally fact-driven such that an evidentiary hearing on the issue would be necessary, there is a very important distinction in the case presented. Substantial consummation here is merely a sub-part of the overall mootness balancing test, as discussed above. Mootness is evaluated by the reviewing court, which may take notice of facts not available to the trial court if they go to the heart of the court's ability to review. *See Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240, 105 S.Ct. 685, 686, 83 L.Ed. 2d 618 (1985) ("When a [post-appeal] development ... could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that

development should be called to the attention of the Court ***without delay***."); *Clark v. K-Mart Corp.,* 979 F.2d 965, 967 (3d Cir. 1992) (Unless reviewing court can receive facts relevant to mootness, "there [is] no way to find out if an appeal has become moot."). Thus, this court may review evidence as to subsequent events not before the courts below which bears upon the issue of mootness. *E.g., Crystal Oil,* 854 F.2d at 81; *Roberts Farms,* 652 F.2d at 796.

Problems can arise, however, where the party opposing a motion to dismiss on mootness grounds contests the newly submitted evidence, as do the debtors here.[11] However, we need not concern ourselves with resolving any such evidentiary dispute in the context of our mootness determination--or remanding it to the bankruptcy court for resolution--because there is no real controversy as to the "facts" regarding the sale of the ranch. Seattle and SeaFirst have filed authenticated copies of the deeds of sale and sales agreements respecting the December 16 sale, and the co-trustees have stated under

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[11] One district court, acting in its appellate function, was faced with a potentially viable challenge to certain affidavit evidence submitted in support of a motion to dismiss on the basis of mootness. *See Huddleston v. Nelson Bunker Hunt Trust Estate,* 102 B.R. 71 (N.D. Tex. 1989). The court determined that the affidavit evidence was appropriately submitted and observed that:

> There may be disputes regarding evidence on the mootness question that are inapposite to the court's decision. If these disputes do not stand in the path of the district court's resolution of the mootness issue, the court need not remand the matter to the bankruptcy court.

Id. at 76 n. 9.

oath that these documents constitute the entire agreement between the Trust and the third-party buyers. Conspicuously absent from the papers before us is any affidavit or documentary evidence--other than sheer speculation by the debtors in their motion to remand--that the sale was somehow compromised in order to facilitate a finding of mootness. This silence is even more suspect in light of the fact that the debtors filed motions to stay in this court to suspend the sale at issue, never once having lodged the charges they make today.[12]

Seattle and SeaFirst urge us to take judicial notice of the unimpeached certified copies of the deeds and assignments executed by the Trust to the third-party purchasers contained in Seattle and SeaFirst's Record Excerpts, an invitation we accept. *E.g. Pratt v. Kelly*, 585 F.2d 692, 696 (4th Cir. 1978); *see also* FED.R.EVID. 201; *cf. Landy v. FDIC*, 486 F.2d 139, 151 (3d Cir. 1973) (taking judicial notice of court documents), *cert. denied*, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed. 2d 312 (1974). We also take note of the properly authenticated sales agreements which fail to evidence any contingency upon the outcome of this appeal. From these documents, it appears that the "centerpiece" of this litigation has been irreversibly sold to third parties. Therefore, "it is very doubtful that effective relief could be afforded even if [the Manges debtors] prevailed on the merits." *In re Information Dialogues, Inc.*,

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[12] We cannot more accurately summarize the situation than did SeaFirst:

For two years, the Manges Debtors played Cassandra, prophesying the fall of their kingdom should the ranch be sold; once the sale happened, they became King Lear, refusing to accept the fate they foresaw.

662 F.2d 475, 476 (8th Cir. 1981) (per curiam). This factor alone weighs heavily in favor of a finding of mootness.

2. Other evidence of "substantial consummation"

Even prior to the sale, the Trust spent millions of dollars improving, upgrading, and preparing the property for sale, countless hours in negotiation of the conveyance, and substantial amounts in appraisals, surveys, and other closing costs. The Trust additionally engaged in negotiations to renew gas production on the ranch mineral estate, to lease both the surface estate and mineral rights, and to dispose of litigation involving Trust assets. Significant amounts were paid to state taxing authorities to reduce the outstanding liability for property taxes on the ranch which had not been paid for several years. Millions of dollars in claims have been paid to date from the creditor fund established by Seattle and SeaFirst.

In sum, (i) the Trust "has transferred all or substantially all of the property proposed by the [P]lan to be transferred"; (ii) the liquidating trustees have assumed the business and management of all the property dealt with by the Plan; and (iii) the Trust has "commence[d] distribution under the [P]lan." 11 U.S.C. § 1101(2). Accordingly, the "substantial consummation" factor counsels convincingly against reviewing the merits of the debtors' challenge to the Plan.

C. The Effect upon Parties not before us

[12] As several courts have made clear, "[s]ubstantial consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant

effective relief." *Frito-Lay, Inc. v. LTV Steel Co., Inc.* (*In re Chateaugay Corp.*), 10 F.3d 944, 952 (2d Cir. 1993) (citing *AOV Industries*, 792 F.2d at 1148). Thus, we must also evaluate the other factors relevant to the mootness issue. With respect to the mootness factor relating to third parties, we reiterate that the ranch property and attendant mineral rights--by far the most substantial assets--have been sold to purchasers who are not before this court. Furthermore, as noted above, millions of dollars in administrative and priority claims have been paid to claimants not parties to this appeal. Millions more have been expended in preparing the property for the sale consummated in December of 1993. The Trust has significantly reduced *ad valorem* tax liabilities by entering into settlements with, and making distributions to, the claimant taxing authorities not participating in the appeal.

We must evaluate these transfers, many of which appear irreversible, against the backdrop of the relief sought--nothing less than a wholesale annihilation of the Plan.[13] All of these third-party recipients and many others

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[13] At oral argument, the Manges debtors' counsel argued for the first time that we might simply strike the offensive portion of the Plan without completely unravelling it. *See Bill Roderick Distrib., Inc. v. A.J. Mackay Co.* (*In re A.J. Mackay Co.*), 50 B.R. 756, 759-60 (D. Utah 1985) (holding that a bankruptcy court may modify a Chapter 11 plan after confirmation by deleting provisions that it did not have the jurisdiction to confirm). We disagree. The Bankruptcy Code provides that a plan may not be modified or amended after substantial consummation has taken place. 11 U.S.C. § 1127(b); *cf. Trans World Airlines, Inc. v. Texaco, Inc.* (*In re Texaco,*

have relied upon the Plan, and the irretrievable depletion of estate assets would correspondingly decrease the amounts available to all claimants. In short, we doubt seriously that we could place the estate or the parties back into the *status quo* as it existed before the confirmation order if we were to unravel the Plan at this time. Therefore, we conclude that this factor weighs heavily against our interference at this late date.

D. Other Factors

Other factors particular to this case also counsel against our intervention. *See In re AOV Industries*, 792 F.2d at 1147-48 ("Determinations of mootness ... require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail."). For example, even assuming the sale of the ranch and mineral rights could somehow be set aside, there is no reason to believe that the property would return to the debtors in the event we reversed the bankruptcy court's confirmation order on appeal. Rather, the ranch would return to SeaFirst, which voluntarily surrendered it to the Trust in order to obtain confirmation of the Plan, and the potential tax liability to the debtors occasioned by the sale on foreclosure would be resurrected.

Inc.), 92 B.R. 38, 46 (S.D.N.Y. 1988) (observing that " 'the piecemeal dismantling of [a plan of reorganization] ... ' is, in practical terms, if nothing else, a virtually impossible task") (quoting *AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986)). In light of the facts that the Plan has been substantially consummated and that the tax provision is integral to the Plan as implemented, the requested modification is simply not possible.

Moreover, Seattle and SeaFirst have expended millions of their own funds--both in cash infusions and forbearance of administrative expenses--in reliance upon the Plan, much of which cannot be recovered. *See, e.g.*, *Crystal Oil*, 854 F.2d at 82 (considering important the fact that a creditor which had made significant sacrifices to obtain confirmation would lose benefits obtained in exchange if appellant successfully overturned plan). Further, if we were to reverse the Plan, the unsecured creditors would likely receive nothing for their claims because the portion of the creditor fund which remains will revert to Seattle and SeaFirst. Additionally, we presume that SeaFirst will reurge its $2 million administrative expense claims and rescind its voluntary subordination of its substantial unsecured debt. The extensive dismantling of this successfully executed Plan would be nothing short of a disaster for the bankruptcy court and the parties before it. These circumstances further persuade us that the instant appeal is prudentially moot.

III. Conclusion

To summarize, the Plan has been virtually fully implemented, and, at this point, unravelling it would be virtually impossible. For the foregoing reasons, we hold that "it would be plainly inequitable for this court to consider the merits of [the Manges debtors' appeal]." *Crystal Oil*, 854 F.2d at 82. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY,	§	
CLINTON MANGES,	§	
AND MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	
	§	
	§	
	§	
CLINTON MANAGES,	§	
ET AL.	§	
	§	
V.	§	C.A. NO. C-91-208
	§	
SEATTLE-FIRST	§	
NATIONAL BANK	§	
AND SEAFIRST	§	
AMERICA	§	
CORPORATION	§	

ORDER DENYING MOTION TO DISMISS
BECAUSE OF MOOTNESS
AND AFFIRMING CONFIRMATION ORDER

Debtor Duval County Ranch Company (DCRC) owned the surface estate of a ranch in Duval County, Texas, and Debtor ManGas Transmission Co. owned the mineral rights. Debtor Clinton Manges owned all of the stock in DCRC and Man-Gas. Beginning in November,

1980, Seattle-First (Seafirst) made various loans to the three debtors and to Helen Ruth Manges, Clinton Manges' wife. The lending relationship deteriorated, and Seafirst filed suit in the Western District of Texas. The parties reached an agreed judgment in favor of Seafirst in the amount of $55,361,545.71, which was signed in August, 1988. Debtors were to pay Seafirst $30,000,000.00 on or before August 10, 1989. Debtors were unable to make that payment, and DCRC filed its petition for bankruptcy protection on August 14, 1989. Clinton Manges and Man-Gas were made the subjects of involuntary petitions on October 2, 1989. In addition to the amount owed to Seafirst, the debtors owed approximately $4,701,897.00 in past due ad valorem taxes assessed against the ranch and mineral interests, as well as owing over $6,000,000.00 to unsecured creditors.

In August, 1990, Seafirst sought to foreclose on the surface estate of the ranch property. The bankruptcy court lifted the stay, and Judge Garcia of the Western District of Texas entered an order of seizure and order of sale. At the foreclosure sale, Seafirst purchased the ranch. Debtors appealed the orders of seizure and sale to the Fifth Circuit.

The creditors filed a proposed plan for reorganization under Chapter 11 of the Bankruptcy Code. While the appeal of the seizure and sale orders was pending, the bankruptcy court signed an order confirming the creditors' plan. The plan provided that Seafirst return the foreclosed ranch to the debtor and that debtors convey their assets, including the returned ranch, to a liquidating trust. Secured claimants would receive payments from liquidation of the trust property. Unsecured claimants were to be paid out of a fund donated by Seafirst.

Debtors appeal from the order confirming the creditors' plan.

Seafirst moves to dismiss debtors' appeal of the confirmation order on grounds of mootness. Once substantial consummation of a Chapter 11 plan creates a situation in which the court could no longer provide relief without affecting newly created rights, an appeal of the confirmation of that plan is moot. 11 U.S.C. § 1127(b); Matter of Sun Country Development, Inc., 764 F.2d 406, 406-07 n.1 (5th Cir. 1985); Central States, Inc. v. Central Transport, 841 F.2d 92 (4th Cir. 1988). Substantial consummation means:

> (A) transfer of all or substantially a of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2).

The Court finds there has been no substantial consummation of this plan. Though the ranch and the mineral rights, the main assets, have been transferred to the liquidating trustee, it has not yet been sold. Accordingly, there are no innocent purchasers involved, and the Court could fashion a remedy. Accordingly, the

Court denies the crditors' (sic) motion to dismiss and addresses the merits of debtors' appeal.

Debtors first contend the bankruptcy court had no jurisdiction to void the foreclosure sale, thus allowing for the return of the ranch to the debtor. Debtors argue only the Fifth Circuit has jurisdiction because debtors already filed their notice of appeal, thus divesting the district court of its jurisdiction over the dispute. This Court disagrees. The bankruptcy court merely resolved a dispute between the debtors and their creditors by allowing the creditors to return the property at issue, thus mooting the appeal. A Chapter 11 plan may provide for the settlement or adjustment of any claim belonging to the debtor or to the estate, 11 U.S.C. § 1123(b)(3), and a compromise involving claims of other parties may be effected by a Chapter 11 plan if it is fair and equitable. In re Texaco, Inc., 84 Bankr. 893, 901 (Bankr. S.D.N.Y. 1988). This Court finds the compromise to be fair and equitable.

Debtors next argue the bankruptcy court erred by not valuing the secured portion of Seafirst's claim. Though the bankruptcy court did not attach a specific monetary value to the claim, it did value all secured claims at the sale value of the collateral securing those claims. The court based that valuation on its findings that there was no equity in any of the property subject to liens, and that the creditors were undersecured. The bankruptcy court's use of sale value to value the secured claims is consistent with the reasoning in Dewsnup v. Timm, 112 S. Ct. 773 (1992). Additionally, this Court finds sufficient evidence to support the findings on which the bankruptcy court based its valuation.

Debtors argue it was impermissible for Seafirst to subordinate its unsecured claim and take the ultimate proceeds from the sale of the collateral as payment on its secured claim. Debtors contend this subordination is a de facto election under 11 U.S.C. § 1111(b), which election is not allowed under a liquidating plan. Under 11 U.S.C. § 506(a), an undersecured creditor gets a secured claim in the amount of the value of the collateral securing its claim, and an unsecured claim for the deficiency. An election under § 1111(b) allows an undersecured creditor in a chapter 11 reorganization to elect to have its entire claim treated as fully secured while waiving its unsecured claim for the deficiency.

The Court finds Seafirst has not made a de facto § 1111(b) election. Seafirst's actions are far more consistent with § 506(a) than with § 1111(b). Seafirst has taken a secured claim in the amount of the value of the collateral securing its loan to debtors, and an unsecured claim for the deficiency. Seafirst has not elected to have its full claim treated as secured, and Seafirst's voluntary subordination of its unsecured claim does not constitute a waiver of that claim.

The plan proponents introduced a Chapter 7 liquidation analysis at the confirmation hearing to demonstrate the unsecured creditors would receive more under the proposed plan than under a Chapter 7 liquidation. The proponents relied on evidence introduced at prior bankruptcy proceedings as well as evidence introduced at the confirmation hearing to support their liquidation analysis. Debtors argue the bankruptcy court erred in failing to value anew each asset in each estate at the confirmation hearing for purposes of such a liquidation analysis. The Court disagrees. The bankruptcy court may

consider prior bankruptcy proceedings as well as evidence presented at the confirmation hearing to engage in such a comparison. In re Aceguia, Inc., 787 F.2d 1352, 1359 (9th Cir. 1986).

Debtors argue the bankruptcy court erred in confirming the plan because the plan did not comply with the requirements of 11 U.S.C. § 1129.[1] This Court finds sufficient evidence to support the bankruptcy court's findings as to the satisfaction of § 1129. Accordingly, those findings are not clearly erroneous.

Debtors argue the bankruptcy court erred in not considering the full effects of the plan on income tax liability: giving the liquidating trustee the power to operate the debtors' property could result in the trust being taxed as a corporation; the foreclosure of the ranch was an irreversible taxable event; the creditor trust is not a grantor trust so it will have its own tax liability.

The bankruptcy court did not err as to the foreclosure of the ranch. The IRS, which is the only entity who could impose the contemplated tax liability, was a party to the confirmation hearing. The representative of the IRS specifically stated "the plan as it is currently stated completely satisfies the existing claim of the IRS and, therefore, we did not oppose confirmation." Because the

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[1]Some of the requirements of § 1129 are as follows: the plan was proposed in good faith, the plan provides more to the creditors than they would have received under a chapter 7 liquidation, the plan is feasible, the plan does not discriminate unfairly, and the principal purpose of the plan is not the avoidance of taxes.

foreclosure and the return of the ranch both occurred before confirmation, any tax liability stemming from the transactions would have been part of the IRS's existing claim. The IRS, like any other creditor who participates in the development of a plan, is bound by the resulting plan. Matter of Crabtree, 76 Bankr. 208, 210 (Bankr. M.D. Fla. 1987). Accordingly, the bankruptcy court need not have considered the possibility of the IRS treating the foreclosure as an irreversible tax event.

The other two claims are related. If the bankruptcy court did not err in finding the trust to be a grantor trust, the court should not have had to consider the possibility of the trust being taxed as a corporation. Debtors cite the Supreme Court's opinion in Holywell Corp. v. Smith, 112 S. Ct. 1021 (1992) for the proposition that the trust is liable for taxes on the gains from sale of the trust property. The Court in Holywell, however, distinguished between a trust formed when the property of the bankruptcy estate, by the terms of the plan, is placed directly in the trust and a trust formed when, as in In re Sonner, 53 Bankr. 859 (Bankr. E.D. Va. 1985), the property revests in the debtor before the debtor transfers it into the trust.

In this case, the terms of the plan required the debtor to sign a blanket conveyance, transferring all of his property to the trust. The property was not placed directly in the trust by the terms of the plan, but revested in the debtor before being conveyed.[2] The Court finds this trust

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[2] For example, when Seafirst transferred the ranch property, thus rescinding the foreclosure sale with the consent of the bankruptcy court, the property went back

to be a true grantor trust like that in Sonner. Accordingly, Holywell does not apply to this trust and the debtor/grantor is liable for any taxes, as the bankruptcy court correctly held.

Debtors next argue the bankruptcy court erred in substantively consolidating the debtors' estates. The bankruptcy court considered the correct factors in determining whether the estates should be consolidated. See Eastgroup Properties v. Southern Hotel Assoc., Ltd., 935 F.2d 245, 249 (11th Cir. 1991); In re Mortgage Investment Co., 111 Bankr. 604, 610 (Bankr. W.D. Tex. 1990). This Court finds the record contains sufficient evidence to support the bankruptcy court's findings, and the consolidation was proper.

Debtors argue the bankruptcy court erred in approving the appointment of Gary Williams, an employee of Seafirst, as trustee because of a conflict of interest. There is no requirement in the Bankruptcy Code that the appointed trustee be free from potential conflicts of interest, only that the trustee not have an "interest materially adverse to the interest of the estate." 11 U.S.C. § 101(14)(E). The bankruptcy court found that any potential conflict is outweighed by the benefit of the appointment of a trustee already familiar with the plan and with the estate, who is willing to serve for free. These findings are reviewable only under the clearly erroneous

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to the debtors. The bankruptcy court then ordered the debtors to convey that property, along with the rest of their property, to the liquidating trust within three days after confirmation of the plan.

standard. In re Lee Holding Co., 102 Bankr. 616, 621 (Bankr. S.D. Ohio 1988). This Court finds there is evidence in the record to support the finding, and the finding is not clearly erroneous. Accordingly, the appointment of Williams was proper.

Finally, debtors argue the bankruptcy court erred by affecting Ruth Manges's property rights without actual notice. She was not denied due process if she had actual notice of the plan. In re DCA Development Corporation, 489 F.2d 43, 47 (1st Cir. 1973); In re Compton, 891 F.2d 1180, 1185 (5th Cir. 1990). This Court already found she had actual knowledge of the plan, and she did not object or appear at the plan confirmation hearings. See Memorandum in Support of Order Denying Motion for Stay Pending Appeal, Misc. No. C-91-23, Finding Numbers 20(i) and (j). Additionally, this Court held she had knowledge of the confirmation of the plan, she owns no property interests affected by the plan, and she has made no homestead claim to any estate property. Id., Conclusion Number 3(b). The bankruptcy court made similar findings, and this Court finds they are supported by sufficient evidence. Accordingly, the bankruptcy court did not deny Ruth Manges her right to due process.

Because there is no merit to any of debtors' grounds for appeal, the bankruptcy court's order is affirmed.

ORDERED this 3 day of May, 1993.

/s/ H.W. Head, Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	NO. 89-01286-C-11
DEBTOR	§	

	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

CLINTON MANGES	§	
DEBTOR	§	NO. 89-01531-C-11

CORRECTED ORDER CONFIRMING FIRST AMENDED CREDITORS' PLAN OF REORGANIZATION OF SEATTLE FIRST NATIONAL BANK AND SEAFIRST AMERICA CORPORATION

After proper notice and a hearing, this Court has considered the First Amended Creditors' Plan of Reorganization of Seattle First National Bank and SeaFirst America Corporation under chapter 11 of the Bankruptcy Code filed by Seattle-First National Bank ("SeaFirst") and SeaFirst America Corporation ("SFA") (collectively "the Proponents") on January 29, 1991 (the "Creditor Plan). The Court, pursuant to its oral findings of fact and

conclusions of law as recited in open court on May 29, 1991, finds:

1. A copy of the Creditor Plan, its approved disclosure statement, the order approving the disclosure statement, and court-approved ballots were transmitted to all persons requiring notice.

2. The solicitation of votes on the Creditor Plan by the Proponents was proper in all respects.

3. The Creditor Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law. Specifically Classes 3, 5, 6, 7, 8, 9, 10, 17, and 18 are impaired and have accepted the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(10).

4. The Creditor Plan complies with the applicable provisions of title 11.

5. The Proponents of the Creditor Plan have complied with the applicable provisions of title 11.

6. The Creditor Plan has been proposed in good faith and not by any means forbidden by law.

7. Each holder of a claim or interest that has not accepted the Creditor Plan will receive or retain under the Creditor Plan property of a value, as of the effective date of the Creditor Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date.

8. The Creditor Plan does not discriminate unfairly and is fair and equitable with respect to each impaired class of claims or interests that did not accept the Creditor Plan.

9. All payments made or to be made by the Proponents or the Liquidating Trustee for services or for costs and expenses in, or in connection with, the Creditor Plan and incident to the case are either approved by the Court as reasonable or are subject to the approval of the Court as reasonable.

10. The identity, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees, if any, of the successor to the debtor under the Creditor Plan after confirmation of the Creditor Plan have been fully disclosed, and the appointment of such person to such offices, or their continuance therein, is equitable, and consistent with the interests of the creditors and equity security holders and with public policy. Specifically, Gary Williams, a vice president at SeaFirst, has been appointed as Liquidating Trustee and Dunigan Petroleum, Inc. will be appointed by the Liquidating Trustee as Operator and their appointment is equitable and consistent with the interests of creditors and equity security holders and with public policy.

11. No insiders are being employed or retained by the Liquidating Trustee. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(B).

12. Confirmation of the Creditor Plan is not likely to be followed by the need for further financial reorganization of the debtor or any successor to the debtor under the Creditor Plan.

13. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9) with respect to the treatment of all known priority claims under 11 U.S.C. § 507.

14. There are no governmental rate changes proposed by the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(6).

15. There are no retiree benefits under 11 U.S.C. § 1114 applicable. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(B).

16. The principal purpose of the Creditor Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. The trust created by the Creditor Plan is a nontaxable grantor trust under subpart E of subchapter J of the Internal Revenue Code. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(d).

17. The effect of the abandonment of the Man-Gas and DCRC stock to Clinton Manges shall be nunc pro tunc as if Manges had owned the stock continuously and the Liquidating Trustee never owned the stock pursuant to Mason v. Commissioner of Internal Revenue, 646 F.2d 1309, 1310 (9th Cir. 1980).

Modifications

18. The following modifications to the Creditor Plan are hereby made and are approved by this Court:

a. The $1.3 million Creditor Fund shall accrue interest at the same rate for SeaFirst market

rate savings accounts. Interest accrued shall supplement the Creditor Fund.

b. Paragraph IV.4.7 of the Creditor Plan is hereby changed to allow for an interim distribution of up to fifty percent rather than thirty percent.

c. Exxon shall be entitled to a Class 17 claim for any royalty it is owed.

d. The Class 3 claimants who are to receive deferred payments shall receive interest in compliance with 11 U.S.C. § 1129(a)(9)(c) at the rate of 10% per annum.

e. The basis for any security for the Class 17 and 18 claimants is Tex. Bus. & Comm. Code § 9-319.

f. The Liquidating Trustee's duties shall include filing and reporting of severance taxes on oil and gas production.

g. The third sentence in paragraph VIII.1 of the Creditor Plan and the third sentence of Article X of the disclosure statement are changed to read: "After Motion Pursuant to the Creditor Plan and a hearing, the Court may eliminate or modify the continuous drilling obligation from the Mobil Lease on grounds of 'economic waste'."

h. The Liquidating Trustee shall pay out of the Creditor Fund to the United States Trustee

the appropriate sum required pursuant to 28 U.S.C. section 1930(a)(6) on the Effective Date of the Creditor Plan and provide to the United States Trustee appropriate documentation including all disbursements for the relevant periods.

i. The basis for any security for the Class 18 claimants shall include section 52.136 of the Texas Natural Resources Code in addition to any security pursuant to Tex. Bus. & Com. Code section 9-319.

j. Article IV.4.4 at page 18 of the Creditor Plan shall be changed to read as follows:

In the event that there is a shortfall in the Production Proceeds Account to meet the above uses of funds, Seattle First National Bank ("SeaFirst") will make advances to this account to accomplish the above uses and if such advances are made, SeaFirst shall be entitled to reimbursement, plus interest, from the Production Proceeds Account for the amounts advanced.

k. The Liquidating Trustee shall have the authority to execute all Texas Railroad Commission forms, including forms P-4, as are necessary to operate the Trust Property and carry out the purposes and intent of the Creditor Plan and the Manges Debtors shall execute all necessary Texas Railroad Commission forms, including forms P-4, as may be necessary to allow the Liquidating Trustee to operate the Trust Property and carry out the purposes and intent of the Creditor Plan.

l. Any interest of any Manges Debtor in any tank batteries and gas pipeline shall be transferred to the Liquidating Trustee under the Blanket Conveyance.

m. All payments made or to be made for services or for costs and expenses in or in connection with the case or in connection with the Creditor Plan and incident to the case, by the Proponents, the Liquidating Trustee, or persons issuing securities or acquiring property under the Creditor Plan for which no administrative expense application for compensation or reimbursement is filed are hereby approved as reasonable. Any such payments for which an administrative expense application for compensation or reimbursement is filed shall be subject to court approval as reasonable.

n. Class 14 is impaired.

o. Class 15 is impaired.

p. Gary Williams, a vice president of SeaFirst, is hereby appointed as Liquidating Trustee.

q. Dunigan Petroleum, Inc. has been chosen as Operator by the Liquidating Trustee.

r. No insiders shall be employed by the Liquidating Trustee. In the event that the Liquidating Trustee desires to employ any insider, an application to the Court shall be made pursuant to the Motion Pursuant to the Creditor Plan

procedure described in Article IV.6.1 of the Creditor Plan.

s. Articles II.14 and II.15 of the Creditor Plan are hereby amended to provide that Marynell Maloney and Vannie Cook Estate shall be eligible for Class 4 unsecured deficiency claims to the extent that their claims may be allowed and to the extent that any security for their claims is not enough to satisfy their claims.

t. All payments owed to the Manges Debtors held by any purchaser of oil or gas, including funds held in suspense by Reata and Coastal, owed on the Confirmation Date shall collectively be termed "Confirmation Date Funds". Immediately upon the signing of this order, all Manges Debtors are enjoined from drawing or otherwise using debtor in possession funds and all financial institutions holding debtor in possession funds are hereby ordered to turn over all debtor in possession funds to the Liquidating Trustee upon presentment of this order. All purchasers of oil and gas or other persons or entities owing money to any Manges Debtor, upon presentment of this order, are hereby enjoined from paying any Manges Debtor, but shall instead pay the Liquidating Trustee all sums that would otherwise be due and payable to any Manges Debtor.

u. In recognition of the undisputed fact that at least $750,000 is owed in base ad valorem tax, the total Class 9 claims shall be allowed to the extent of $750,000. This $750,000 shall be distributed to the Class 9 claimants pro rata, or as

they may agree, within thirty days of the Confirmation Date or within thirty days of the Liquidating Trustee's receipt of all Reata/Coastal Confirmation Date Funds, whichever is later. These funds received by the Class 9 claimants shall reduce their claims accordingly. The Liquidating Trustee shall place all other Confirmation Date Funds in the Production Proceeds Account.

v. The source of payment for the $750,000 shall be the Confirmation Date Funds that are SeaFirst or SFA collateral. In the event that there is not at least $750,000 in Confirmation Date Funds that are SeaFirst or SFA collateral, then SeaFirst shall pay to Class 9 whatever additional sums are necessary to make the $750,000 payment when due.

w. The remaining portion of the Class 9 claims that are ultimately found to be allowed shall bear interest at the rate of 10 percent per annum from the Effective Date until paid.

x. If the collateral that is the source of payment to the allowed Class 9 claimants is not sold within 12 months of the Confirmation Date, then installment payments out of production proceeds shall be made to the allowed Class 9 claimants. The installment payment shall be structured such that the allowed Class 9 claims are paid in full within 36 months of the Confirmation Date. These installment payments shall be made in equal installments, escalating installments, diminishing installments, or any combination of the above, with a balloon payment or payments as is

reasonable in the light of the availability of production proceeds without regard to any contribution by SeaFirst. The reasonableness of the installment payment structure shall be by agreement or determined under the Motion Pursuant to Creditor Plan procedure described in Article IV.6.1 of the Creditor Plan.

y. The following sentences are added to Article IV.4.4(ii): Property taxes for 1990 shall be paid on the Effective Date. Property taxes for 1991 shall be paid on the Effective Date or when due and payable, whichever is later.

z. Article IV.2.1 of the Creditor Plan is hereby amended to read as follows:

IV.2.1. Execution of documents to Effectuate the Creditor Plan. Within three days of the Confirmation Date, the Manges Debtors and Helen Ruth Manges shall execute the Manges Creditor Trust Agreement and Blanket Conveyance establishing the Manges Creditor Trust and transferring all Manges Debtor Estate property to the Manges Creditor Trust, thereby creating Trust Property. Clinton Manges shall retain all property listed as exempt in his schedules filed on about March 14, 1990. There shall be no homestead claim whatsoever in favor of anyone on the Duval County Ranch or on any of the estate or Trust Property. The Manges Creditor Trust Agreement and the Blanket Conveyance shall be substantially in the form as in Appendix 1 and 2, respectively. The Manges Debtors and Helen Ruth Manges shall be under a continuing obligation to execute, within

three days of demand, all documents of any kind to assist in effectuation of the purposes and intent of the Creditor Plan. The Court may order any other person at any time to execute all documents of any kind pursuant to section 1142 to assist in effectuation of the purposes and intent of the Creditor Plan. Pursuant to this provision, by order confirming the Creditor Plan, the Court will order all signatories necessary to carry out the provisions of the Blanket Conveyance to execute the Blanket Conveyance within three days of the Confirmation Date. In the event that the Manges Debtors, Helen Ruth Manges or any other person under an obligation herein to execute documents has not executed documents by the specified deadline, then the Court appoints Colin K. Kaufman to execute documents in the stead of any of the Manges Debtors, Helen Ruth Manges, or any other necessary signatory and such signature by the above appointee shall have the same legal effect as if the Manges Debtors, Helen Ruth Manges, or any other necessary signatory had executed the documents. Further, pursuant to section 1142, the Court orders Colin K. Kaufman to execute documents pursuant to the above appointment within three days of written demand by the Proponents' or the Liquidating Trustee's attorneys. In the event of an appointee execution of a document, there shall be no recourse whatsoever against the appointee, the Court, the Liquidating Trustee, or the Proponents, although there may be recourse against the persons for whom the signatures are being supplied. In the event of any legal or physical incapacity preventing Colin K. Kaufman from executing documents, the Court may appoint a substitute or successor

appointee to execute documents pursuant to this article. The Creditor Plan also shall be as legally effective to transfer and protect title as the Blanket Conveyance and may be publicly recorded instead of the Blanket Conveyance.

aa. Article I.4.10 of the Creditor Plan is hereby amended to read as follows: I.4.10 Confirmation Date. "Confirmation Date" Means the eleventh day after the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. Do not confuse the Confirmation Date with the "Effective Date" the "Consummation Date", or the "Closing Date". "Pre-Confirmation" means that period of time prior to and including the date that the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. "Post-confirmation" means that period of time beginning after the date the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan.

bb. Article I.4.19 of the Creditor Plan is hereby amended to read as follows: I.4.19 Effective Date. "Effective Date" means the ninetieth day after the Confirmation Date. If the Effective Date falls on a Saturday, Sunday or legal holiday under the Federal Rules of Civil Procedure, then the Effective Date shall be the next weekday that is not a legal holiday.

cc. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

dd. Notwithstanding any provision to the contrary, and except as herein provided, all Creditor Fund distributions shall be made within 36 months of the Effective Date (the "Distribution Deadline"). In the event that the Distribution Deadline arrives and all Creditor Fund collection and Eligibility matters are not completed, the Liquidating Trustee shall make Creditor Fund distributions to eligible allowed claimants on the Distribution Deadline and withhold only so much of the Creditor Fund as may be reasonably necessary to cover remaining Creditor Fund Collections and Eligibility Matters.

ee. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

ff. Upon the signing of the order confirming the Creditor Plan, the January 16, 1991 foreclosure on the Duval County Ranch is hereby rescinded and made void ab initio and all liens in existence immediately prior to the foreclosure, including the Proponent's liens, are reinstated in the order of priority that existed immediately prior to the foreclosure. The Blanket Conveyance shall include a provision whereby the Manges Debtors convey the Duval County Ranch to the Liquidating Trustee. The Duval County Ranch shall be Trust Property, and the Liquidating Trustee shall treat the Duval County Ranch and its income as Trust Property under the Creditor Plan. Accordingly, the Liquidating Trustee shall sell the Duval County Ranch pursuant to the Creditor Plan and a lien shall attach on sale proceeds in favor of those creditors, including the Proponents, with liens against the Duval County Ranch

immediately prior to the foreclosure. The effect of this provision shall be to make moot any adversary proceedings, appeals, or other actions or proceedings concerning the lifting of the stay on actions against the Duval County Ranch, the foreclosure on the Duval County Ranch, and the eviction from the Duval County Ranch. In the event that the confirmation of the Creditor Plan is overturned on appeal, denied upon reconsideration, revoked, or otherwise found invalid, then the foreclosure and eviction are reinstated in full and fee title to and the right to possession, dominion, and control of the Duval County Ranch automatically shall revest in Seattle First National Bank without the necessity for any action whatsoever by the Court or the Manges Debtors.

gg. The last unnumbered paragraph of Article IV.2.2 is hereby amended to read: Failure to cooperate fully shall be punishable by any available remedy and specifically by contempt of court; and all reasonable costs and reasonable attorney fees incurred in connection with any such motion for contempt may be assessed against the disobedient party in the court's discretion. The Liquidating Trustee shall be entitled to a writ of execution, writ of assistance, writ of ejection, forcible detainer, or forcible entry and detainer, upon application to the clerk.

hh. The Liquidating Trustee shall provide to the IRS any necessary information returns and shall provide such information to the Manges Debtors as may be reasonably necessary to enable the Manges Debtors to file income tax returns.

ii. Article IV.6.c. and IV.6.d. are hereby modified to read as follows:

c. To invest and reinvest the Trust Property in any demand deposits.

d. To enter into any transaction with respect to the Trust Property despite the fact that another party to any such transaction may be the Proponents.

jj. This liquidating trust shall terminate 36 months from the Effective Date unless the Liquidating Trustee, in his sole discretion, determines that an extension is necessary to complete unfinished duties.

kk. Production Proceeds income shall be distributed annually to SeaFirst except to the extent reasonably necessary to meet Creditor Plan obligations.

ll. In the event that all allowed claims are paid in full, any remaining Trust Property or Creditor Fund money shall revert to the Manges Debtors pro rata.

mm. Notwithstanding any provision that may appear to the contrary, the conveyance of bankruptcy estate property by the Manges Debtors to the Liquidating Trustee pursuant to the Creditor Plan and Blanket Conveyance shall be subject to liens and encumbrances. The Liquidating Trustee shall then sell the Trust Property free and clear of liens with such liens of allowed secured creditors attaching to the sales proceeds or net sales proceeds as provided in the Creditor Plan.

19. The modifications in paragraph 18 supersede all modifications that appeared in the Order Approving Disclosure Statement and Fixing Time for Filing

Acceptances or Rejections of Plan, Combined with Notice Thereof signed by the Court on March 11, 1991.

The Creditor plan filed by Seattle-First National Bank and SeaFirst America Corporation on January 29, 1991, a copy of which is attached hereto, is confirmed as modified herein.

Signed and ordered entered this date: /s/ June 7, 1991, but effectively signed and effective for all purposes on May 31, 1991.

BY THE COURT

/s/ Richard S. Schmidt
RICHARD S. SCHMIDT

UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	NO. 89-01286-C-11
DEBTOR	§	

	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

	§	
CLINTON MANGES	§	NO. 89-01531-C-11
DEBTOR	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 1, 13, and 20, 1991, came on for hearing in the above-referenced Chapter 11 cases the First Amended Original Creditors' Plan of Reorganization ("Creditor Plan") filed by Seattle-First National Bank ("SeaFirst") and SeaFirst America Corporation ("SFA") [collectively, Proponents"]. On May 1, 1991, the initial day of the confirmation hearing, the Proponents presented to the Court a proposed "Order Confirming First Amended Original Creditors' Plan of Reorganization of Seattle-First National Bank and SeaFirst America Corporation ("Confirmation Order"; a copy of which is attached hereto as Exhibit "A"). Paragraph 18 of the Confirmation Order

contains modifications to the Creditor Plan, which the Court has considered in making its ruling.

The debtors, The Law Offices of Royal D. Adams ("Adams"), John E. Cooper ("Cooper"), the Internal Revenue Service ("IRS"), Duval County, Benavides Independent School District, San Diego Independent School District, and Freer Independent School District (collectively, "Taxing Units"], filed objections to the Creditor Plan. The Taxing Units withdrew their objections, attended the confirmation hearing through counsel, and supported confirmation of the Creditor Plan. The IRS attended each day of the confirmation hearing through counsel and announced at the end of the hearing that it did not oppose confirmation of the Creditor Plan. At the conclusion of the hearing, all parties rested and closed, and arguments were presented on May 29, 1991.

Following full evidentiary hearing with notice to all necessary parties, the Court confirms the Creditor Plan as modified, and makes the following findings of fact and conclusions of law with respect to the issue of confirmation. All findings of fact and conclusions of law should be considered in the light of their designation; provided however, findings of fact may be interpreted as conclusions of law and vice versa if such an interpretation is necessary to comply with Federal Rule of Civil Procedure 52.

I.

Findings of Fact

The Court hereby finds the following facts:

A. Regarding Creditor Plan (as modified by the Confirmation Order).

1. The Court generally finds that the Creditor Plan complies with all requirements of 11 U.S.C. § 1129 and other applicable law. All findings should be interpreted as consistent with this general finding, and any omissions in these findings should be construed as an implied finding in support of this general finding based on the evidence presented at the confirmation hearing and the Court's judicial notice of the proceedings and files in these bankruptcy cases and of other litigation and evidence from sources whose accuracy cannot reasonably be questioned. The substantial rights of parties in interest are not affected by minor defects in the Creditor Plan or the evidence presented at the confirmation hearing and the court disregards such defects under the harmless error rule. Bankr. R. 9005; Fed. R. Civ. P. 61.

2. Duval County Ranch Company ("DCRC") filed its voluntary petition in these proceedings for relief under Chapter 11 of the United States Bankruptcy Code on August 14, 1989.

3. Clinton Manges ("Manges") and Man-Gas Transmission Company ("Man-Gas") were made the subjects of separate involuntary petitions for relief under Chapter 11 of the United States Bankruptcy Code filed on October 2, 1989.

4. An order for relief in the Manges bankruptcy was entered on March 8, 1990.

5. An order for relief in the Man-Gas bankruptcy was entered on April 4, 1990.

6. On January 4, 1991, the debtors filed their Third Amended Plan of Reorganization as modified ("Debtors Plan").

7. On January 16, 1991, the United States Marshal for the Southern District conducted a judicial sale of the 99,000 acre Duval County Ranch, which had previously been property of the DCRC bankruptcy estate. SeaFirst was the purchaser at the sale.

8. Confirmation of the debtors' plan was denied on January 26, 1991.

9. On or about January 29, 1991, the Proponents filed the Creditor Plan and its First Amended Original Disclosure Statement to First Amended Original Creditors Plan of Reorganization of Seattle-First National Bank and SeaFirst America Corporation ("Disclosure Statement").

10. The Court approved the Disclosure Statement as containing adequate information under 11 U.S.C. § 1125 in an Order Approving Disclosure Statement and Fixing Time for Filing Acceptances and Rejections of Plan, Combined with Notice Thereof ("Disclosure Statement Order") dated March 11, 1991. The Disclosure Statement Order contained certain modifications to the Creditor Plan that were approved by the Court.

11. A copy of the Creditor Plan, the Disclosure Statement, the Disclosure Statement Order, and court-approved ballots were transmitted to all persons requiring notice in compliance with the Disclosure Statement Order and the Bankruptcy Rules.

12. The solicitation of votes on the Creditor Plan by the Proponents was proper in all respects.

13. Based on the totality of the circumstances, the Creditor Plan has been proposed in good faith and not by any means forbidden by law in compliance with 11 U.S.C. § 1129(a)(3). Specifically,

(a) Votes on the Creditor Plan were solicited by a proper court-approved disclosure statement and in compliance with the Bankruptcy Code, Bankruptcy Rules and case law concerning solicitation of votes;

(b) The Creditor Plan does not contain any provision inconsistent with the interests of creditors or public policy;

(c) The Proponents intend to carry out the Creditor Plan to full consummation;

(d) The evidence submitted in support of objections concerning lack of good faith are mere suspicions, conclusions, and speculation and amount to little more than a scintilla of evidence; and

(e) There has been no objection or evidence that the Creditor Plan was proposed by means forbidden by law and the Court presumes compliance with the law under Bankr. R. 3020(b)(2).

14. The Proponents have complied with the applicable provisions of Title 11. Accordingly, the requirements of 11 U.S.C. § 1129(a)(2) have been met.

15. The Creditor Plan complies with the applicable provisions of Title 11, including 11 U.S.C. §§ 1122-1127. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(1).

16. The Creditor Plan contains all provisions required by 11 U.S.C. § 1123 and contains no provisions prohibited under 11 U.S.C. § 1123.

17. The Creditor Plan provides adequate means for its implementation. The Creditor Plan creates a liquidating creditor trust. The trust will be managed by a Liquidating Trustee, who is an employee of SeaFirst who will serve without compensation from the estates or the trust. Under the Creditor Plan, all property of the bankruptcy estates is transferred to the Liquidating Trust. Part of the estate property transferred to the Liquidating Trust will be oil and gas interests. In addition, the Creditor Plan provides that the January 16, 1991 sale be voided ab initio and the Duval County Ranch simultaneously transferred to the Liquidating Trust. The Liquidating Trustee will manage the property, sell the property, and distribute the net sales proceeds to creditors holding allowed secured claims against the property.

During the interim between confirmation and sale, proceeds may be generated from oil and gas operations, which are called Production Proceeds. These Production Proceeds are generally the collateral of SeaFirst and those proceeds will generally provide the operating funds for the Liquidating Trustee. SeaFirst will make advances to the Production Proceeds to assure adequate cash flow and feasibility. The administrative claims, priority claims (except Class 3 government claims, which shall be paid from its or SeaFirst's collateral), and unsecured claims that are allowed are to be paid from a $1.3 million Creditor Fund, which has been contributed by SeaFirst. The Creditor Fund may be enhanced by voidable transfer litigation and from any excess from the sales of property. Recovery by the general unsecured creditors is further enhanced by the Proponents' waiver of an estimated $1.7 million in administrative expenses and voluntary subordination of SeaFirst's estimated $36 million unsecured claim (the secured claim of SeaFirst shall be established by the sale of its collateral). In the event that all allowed claims are paid in full, the debtors shall receive any excess. With certain exceptions, the Creditor Plan terminates three years from its effective date.

18. The Creditor Plan specifies classes of claims and interests and properly classifies claims and interests. Each class contains claims that are substantially similar and no classes contain substantially dissimilar claims. The Creditor Plan complies with 11 U.S.C. §§ 1122 and 1123(a)(1).

19. The Creditor Plan specifies which classes are impaired and unimpaired and specifies the treatment of those classes. The Creditor Plan complies with 11 U.S.C. § 1123(a)(2) and (3).

20. The Creditor Plan provides for the same treatment for each claim or interest holder of a particular class. The Creditor Plan complies with 11 U.S.C. §§ 1123(a)(4) and 1129(b)(1).

21. All payments made or to be made by the Proponents or the Liquidating Trustee for services or for costs and expenses in, or in connection with, the Creditor Plan and incident to the case are either approved by the Court as reasonable or are subject to the approval of the Court as reasonable. Specifically, the Proponents have incurred preconfirmation costs of approximately $1.5 million in connection with these three bankruptcies. The Proponents assert no administrative expense claim for these costs and the Creditor Plan provides for application and court approval for any fees for which an administrative expense claim is filed. This is sufficient compliance with section 1129(a)(4). See In re Texaco, Inc., 84 Bankr. 893, 908 (Bankr. S.D.N.Y. 1988) (suggesting that section 1129(a)(4) does not require court approval for fees for which no fee application is necessary). In addition, since the fees and costs are paid from outside the bankruptcy estate, the Court cannot order disgorgement of the fees. Matter of Hargis, 887 F.2d 77, 79 (5th Cir. 1989). Further, the Court takes judicial notice of the proceedings in which the Proponents have been involved and finds that the preconfirmation attorneys' fees and costs are reasonable under the standards of In re First Colonial Corp. of America, 544 F.2d 1291 (5th Cir. 1988), especially in the light of the fact that the fees will not be an administrative expense. Certain post-confirmation fees and costs concerning Creditor Fund matters are subject to court approval as reasonable pursuant to Creditor Plan Article V.5 at page 29. Other post-confirmation fees will be paid by the

Proponents from their Production Proceeds under Creditor Plan Article IV and, accordingly, are reasonable.

22. The identity, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees, of the successor to the debtors under the Creditor Plan after confirmation of the Creditor Plan are irrelevant because there will not be any such positions. The Creditor Plan and Disclosure Statement disclosed that the Liquidating Trustee may be an employee of the Proponents. Gary Williams is a vice president of SeaFirst and has been appointed as Liquidating Trustee. Mr. Williams is qualified to manage and liquidate assets of the trust. In addition, any potential conflict of interest between Mr. Williams and the creditors is outweighed by the benefit of Mr. Williams' appointment, by the protective provisions of Creditor Plan Articles IV. 6.1 and IV. 7.d, and by the overall benefits of the Creditor Plan. These benefits include:

(a) the Proponents' contribution of the $1.3 million Creditor Fund;

(b) the Proponents' waiver of their approximate $1.7 million administrative expense claims;

(c) SeaFirst's voluntary subordination of its unsecured claim;

(d) the fact that Mr. Williams' services are free of charge, while the cost of hiring an independent trustee would be tremendous; and

(e) the fact that most of the collateral is the Proponents' collateral.

Accordingly, Mr. Williams' appointment is equitable and consistent with the interests of creditors and equity security holders and with public policy. The Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(A).

23. No insiders are being employed or retained by the Liquidating Trustee. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(B).

24. Each holder of a claim or interest that has not accepted the Creditor Plan will receive or retain under the Creditor Plan property of a value, as of the effective date of the Creditor Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date. Specifically, nonaccepting claimholders and interest holders in any of these bankruptcies would receive no distribution in a chapter 7 liquidation. No creditors made an election under 11 U.S.C. § 1111(b). The Creditor Plan complies with 11 U.S.C. § 1129(a)(7).

25. Classes 14 and 15 were timely served with the Creditor Plan, Disclosure Statement, Disclosure Statement Order, and court-approved ballots.

26. The Creditor Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law. Specifically, classes 3, 5, 6, 7, 8, 9, 10, 17, and 18 are impaired and have accepted the Creditor Plan, without considering the votes of insiders. The Creditor Plan complies with 11 U.S.C. § 1129(a)(10).

27. The Proponents requested confirmation of the Creditor Plan under the cramdown provisions of 11 U.S.C. § 1129(b).

28. The Creditor Plan does not discriminate unfairly with respect to any class of impaired creditors and interest holders that did not accept the Creditor Plan. The Creditor Plan complies with 11 U.S.C. § 1129(b)(l).

29. As of the date of the initial hearing on confirmation, no class of secured creditors rejected the Creditor Plan. Additionally, the Creditor Plan does not unfairly discriminate and is fair and equitable with respect to all secured creditors. The Creditor Plan provides for the sale of trust property free and clear of liens with those allowed liens attaching to the sales proceeds, for the payment of interest to the secured claimants, and for the payment of the indubitable equivalent of the allowed secured claims to the secured creditors. The Creditor Plan complies with 11 U.S.C. § 1129(b)(2)(A).

30. The Creditor Plan is fair and equitable with respect to all classes of impaired unsecured creditors who did not accept the Creditor Plan. Specifically, the Creditor Plan provides for a Creditor Fund and other assets to make payment on these claims and no holder of any claim or interest that is junior to the unsecured claims is receiving or retaining any property. The Creditor Plan complies with 11 U.S.C. § 1129(b)(2)(B).

31. The Creditor Plan is fair and equitable to the equity security holder of DCRC and Man-Gas, and to Manges individually. The Creditor Plan complies with § 1129(b)(2)(C). Specifically:

(a) No one junior to Manges is receiving any property under the Creditor Plan.

(b) In addition, Manges shall receive a complete discharge under 11 U.S.C. § 1141 unless a party in interest prevails on a discharge or dischargeability complaint.

(c) There should not be any significant post-confirmation income tax liability to Manges due to the availability of tax attributes, the value of the collateral, the availability of subchapter S termination, and the lack of personal liability to Manges for DCRC's taxes.

(d) Even in the event that the debtors are faced with post-confirmation tax liability, the Creditor Plan is not unfair or inequitable since the debtors have had the benefit of the prepetition use of money and property without the burden of paying taxes.

32. Confirmation of the Creditor Plan is not likely to be followed by the need for further financial reorganization or liquidation of the debtors or any successor to the debtors under the Creditor Plan. In addition, the Creditor Plan proposes liquidation, obviating a need for a finding under 11 U.S.C. § 1129(a)(11). In re Pero Brothers Farms Inc., 90 Bankr. 562, 563 (Bankr. S.D.

Fla. 1988). The Creditor Plan complies with 11 U.S.C. § 1129(a)(ll).

33. The Creditor Plan is feasible:

(a) it is a liquidating plan, so section 1129(a)(11) does not apply;

(b) the $1.3 million Creditor Fund is on hand and available for distribution;

(c) there is a significant likelihood of distribution within a reasonable time from the Creditor Fund to the allowed unsecured claimants due to the waiver and subordination of certain SeaFirst claims and the payment of other claimants from collateral;

(d) SeaFirst will make advances to the Production Proceeds account to ensure feasibility and SeaFirst has the financial ability to perform on this obligation; and

(e) there is no objection or evidence that the Liquidating Trustee will not do what he is required to do by the Creditor Plan, making such plan feasible as a liquidation. In re Elm Creek Joint Venture, 93 Bankr. 105, 110 (Bankr. W.D. Tex. 1988).

34. Allowed Class 3 government claims under 11 U.S.C. § 507(a)(7) will be paid deferred cash payments, plus ten percent interest, over a period not exceeding six years from the date of assessment. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9)(C).

35. Allowed priority claims under 11 U.S.C. § 507 shall be paid on the effective date. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9)(A) and (B).

36. There are no governmental rate changes proposed by the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(6).

37. There are no retiree benefits applicable to these cases. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(13).

38. The principal purpose of the Creditor Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. No governmental entity raised an objection under 11 U.S.C. § 1129(d). The Creditor Plan complies with 11 U.S.C. § 1129(d).

39. The Creditor Plan provides for payment to the United States Trustee of the appropriate sums required by 28 U.S.C. § 1930(a)(6) on the effective date and for the provision of appropriate documentation to the United States Trustee for disbursement for relevant periods. The Creditor Plan complies with 11 U.S.C. § 1129(a)(12).

40. There will not be any federal income tax effects from the transfer of estate property to the liquidating trust.

41. The Creditor Plan creates a trust that is a nontaxable grantor trust under subpart E of subchapter J of the Internal Revenue Code.

42. The trust created by the Creditor Plan is not a partnership, corporation, or similar business association and is not a common-law or Texas Trust Code trust.

43. The debtors are both the grantors and the beneficiaries of the grantor trust created by the Creditor Plan. The debtors are grantors because their bankruptcy estate property is used to fund the trust and they are beneficiaries because the trust property will be used to pay the debtors' legal obligations.

44. The Liquidating Trustee is not a trustee under Title 11 and is not a fiduciary, but is a contract trustee.

45. Under the Creditor Plan, the Liquidating Trustee's duties are ministerial in nature and he functions as a liquidating agent with regard to his activities under the Creditor Plan. Specifically, the Liquidating Trustee is under a duty to liquidate trust property and has no discretion but to do so. In addition, the Liquidating Trustee has no discretion on how to distribute trust property proceeds and Creditor Fund monies because the distribution must be in accordance with the Creditor Plan.

46. The stock of DCRC and Man-Gas is being abandoned to Manges. Each debtor will retain whatever tax attributes are available as of the date of confirmation.

47. The trust created by the Creditor Plan:

(a) is for the primary purpose of liquidating trust assets with no objective to carry on a trade or business;

(b) contains a termination date of 36 months from the effective date;

(c) provides that the Liquidating Trustee's investment powers are generally limited to demand deposits;

(d) is not receiving transfers of any significant listed stocks or securities, any readily marketable assets, or any operating assets of a going business;

(e) is not receiving and will not retain cash in excess of a reasonable amount to meet claims and contingent liabilities;

(f) is not receiving any significant transfers of any unlisted stock of a single issuer that represents 80 percent or more of the stock of such issuer;

(g) is not receiving transfers of any general or limited partnership interests; and

(h) requires the Liquidating Trustee to distribute at least annually the proceeds from the sale of assets or income from investments.

48. There is no equity in any of the property of the estates subject to liens. The value of the secured claims shall be determined by the sales price for the collateral.

49. Since the Creditor Plan provides for the sale of all property of the estates, the sale price shall determine the value and, accordingly, the amount of secured claims.

50. The Creditor Plan places only property of the bankruptcy estates of DCRC, Man-Gas and Clinton Manges into the trust and does not attempt to exercise jurisdiction over any other property. No property rights of Helen Ruth Manges are affected by the Creditor Plan.

51. The March l, 1979 warranty deed concerning 201.11 acres of the Duval County Ranch described in the February 25, 1991 Motion to Enforce Automatic Stay and For Cancellation of Fraudulent Void Transfer in the DCRC bankruptcy case is void as unperfected on the date of the DCRC bankruptcy petition and the February 11, 1991 recording of that warranty deed is void as an act in violation of the automatic stay in DCRC's bankruptcy case.

52. No homestead has been properly claimed by any debtor or any dependent of any debtor in any of these

bankruptcy cases and the time for the debtors and their dependents to claim a homestead has expired.

53. There is no homestead in favor of anyone on the Duval County Ranch or any of the bankruptcy estate or trust property.

54. The debtors and Helen Ruth Manges are bound by the collateral estoppel effect of two federal court judgments that there is no homestead on the Duval County Ranch. The property that was alleged to be homestead at the confirmation hearing is the same property that was found not to be homestead in these two final judgments. Had Helen Ruth Manges claimed a homestead on the property, her claim would have been barred by collateral estoppel.

55. All non-exempt property scheduled by Clinton Manges in his bankruptcy schedules of March 14, 1990, is either his separate property or his sole management community property and is therefore property of his bankrupt estate that is transferred to the trust under the Creditor Plan. Those schedules show "other evidence of ownership" or possession raising a presumption, which was unrebutted, of sole management community property of Clinton Manges. See Tex. Fam. Code Ann. § 5.24 (Vernon 1975).

56. Helen Ruth Manges had actual notice of the Creditor Plan sufficient to afford her an opportunity to be heard at the confirmation hearing. Clinton Manges discussed the Creditor Plan with Helen Ruth Manges. David Towler, an attorney who represents Helen Ruth Manges on other matters, also discussed the Creditor Plan with her. Helen Ruth Manges failed to object or appear

at the confirmation hearing and therefore waived any procedural or substantive objections to the Creditor Plan and is accordingly bound by the Creditor Plan.

57. Based on this court's judicial notice of the claims on file and the proceedings in these bankruptcy cases, and the lack of evidence suggesting any other disposition, the Creditor Plan's disposition of pending litigation under Article V of the Creditor Plan is proper, fair, and equitable in accordance with In re Texaco Inc., 84 Bankr. 893, 901-02 (Bankr. S.D.N.Y. 1988) and cases cited therein. Specifically, the Court finds that the following adversary proceedings concern matters that have not been actively prosecuted or that have no significant value to the estates, and accordingly their dismissal with prejudice is proper:

(a) Man-Gas Transmission Co. and Clinton Manges v. First City Texas-Houston N.A. d/b/a First City Texas-McAllen, John Hughes, and Winn Exploration Co., Inc.; Adversary No. 90-0121-C;

(b) Duval County Ranch Company v. Seattle-First National Bank and SeaFirst America Corporation, Adversary No. 90-0152-C;

(c) Alberto Garza Uresti, Abelardo Ramos, Juan I. Barrera, Jose Luis Sifuentes, Jesus Angel Saenz, Ernesto A. Rodriguez, Damingo S. Cadena,

and Martin Benitez v. Duval County Ranch Co., Adversary No. 89-0200; and

(d) Duval County Ranch Company v. Seattle-First National Bank and McCamish, Martin, Brown & Loeffler, A Professional Corporation, Adversary No. 89-0143-C.

58. The debtors have issued consolidated financial statements to third parties.

59. Manges own all of the stock in DCRC and Man-Gas.

60. The debtors have commingled assets and business functions in the past.

61. Segregating assets and liabilities of the separate debtors would cause unnecessary expense and delay in administration.

62. The debtors have transferred property among themselves without observing corporate formalities.

63. The debtors have engaged in intercompany transfers.

64. The debtors have jointly guaranteed debts.

65. The substantive consolidation of the estates under the Creditor Plan is equitable and beneficial to all creditors. The debtors and nonconsenting creditors are

not harmed by the substantive consolidation. The secured creditors are not affected by the consolidation. In the absence of consolidation under the Creditor Plan, the unsecured creditors would receive nothing. The creditors will suffer greater harm in the absence of the consolidation than the debtors and nonconsenting creditors will suffer from its imposition.

66. Class 16 is a class of $1,000 or less claims or those who will reduce their claims to $1,000 or less. The Court approves the establishment and treatment of Class 16 as reasonable and necessary for administrative convenience. Specifically, since it is unlikely that anyone will object to Class 16 claims, it is convenient to allow those claims and pay them early to avoid delay and to effect earlier consummation of the Creditor Plan. Further, the treatment of Class 16 does not unfairly discriminate against other unsecured creditors. The claims are small and the impact of their payment on other creditors is de minimis. Any creditor can elect to be in Class 16. The Proponents are providing the Creditor Fund from outside the estate and without the Creditor Plan the unsecured creditors would receive nothing. If there is discrimination, it is not unfair.

67. The modifications in the Confirmation Order supersede all previous modifications that appeared in the Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof signed by the Court on March 11, 1991.

68. The modifications in the Confirmation Order do not materially or adversely affect any creditor who voted in favor of the Creditor Plan and no Creditor who

voted in favor of the Creditor Plan would be likely to reconsider its vote based on the modifications. The Proponents do not seek to resolicit votes from creditors that did not accept the Creditor Plan. Accordingly, the modifications are among those allowed without the need to renotice creditors and are proper under 11 U.S.C. § 1127, Bankruptcy Rule 3018, and In re American Solar King Corp., 90 Bankr. 808, 823 (Bankr. W.D. Tex. 1988).

69. This Court has jurisdiction over this proceeding and this is a core proceeding. 28 U.S.C. §§ 1334 and 157(b)(2)(L).

II.

Conclusions of Law

Based upon the foregoing findings of fact, the Court concludes the following:

A. Regarding the Creditor Plan as modified in the Confirmation Order.

1. The bankruptcy court is a court of equity; substance will not give way to form and technical considerations will not prevent substantial justice from being done. Pepper v. Litton, 308 U.S. 295, 304-05 (1939).

2. The harmless error rule of Bankruptcy Rule 9005 applies in plan confirmation proceedings, and a plan should not be rejected due to technical and insubstantial violations of the bankruptcy code. See In re Johns-Manville, 843 F.2d 636, 648 (2d Cir. 1988). Federal Rule of Civil Procedure 61 applies in cases under the bankruptcy code; when appropriate, the court may order

the correction of any error or defect or the cure of any omission that does not affect substantial rights. Bankr. R. 9005. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.

3. The bankruptcy court may take judicial notice of its own records, including docket entries and pleadings filed. Securities and Exchange Commission v. First Financial Group of Texas, 645 F.2d 429, 433 n.6 (5th Cir. 1981). A court may take judicial notice, whether requested or not, at any stage of a proceeding. Fed. R. Evid. 201(c),(f).

4. A plan must be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) refers to the proposal of the plan, not to the conduct of the case. In re Madison Motel Assoc., 749 F.2d 410, 425 (11th Cir. 1984). Good faith under section 1129(a)(3) is based on the totality of the circumstances. In re Sun Country Dev. Inc., 764 F.2d 406, 408 (5th Cir. 1985). The issue of good faith is whether the plan represents a legitimate pursuit of reorganization and not an attempt to abuse the confirmation process to achieve some improper purpose. Id. A plan is proposed in good faith when there is a reasonable likelihood that the plan will achieve a result consistent with the purposes of the bankruptcy code. In re Stolrow's Inc.. 84 Bankr. 167, 172 (9th Cir. B.A.P. 1988); In re Mikron, Inc., 27 Bankr. 773, 778 (Bankr. E.D. Mich. 1983). Good faith includes an intent to follow through with consummation of the plan. In re Koebl, 752 F.2d 137, 139 (2d Cir. 1984). One proper purpose of a chapter

11 plan is liquidation. 11 U.S.C. § 1123(a)(5); In re Jasik, 727 F.2d 1379, 1382 (5th Cir. 1984).

5. If no objection is filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues. Bankr. R. 3020(b)(2). While an objection concerning lack of good faith was filed, no objection was filed alleging that the Creditor Plan was proposed by means forbidden by law and no credible evidence has been brought forth by the objectors concerning either matter. It is inappropriate for a court to deny confirmation under section 1129(a) (3) (good faith) solely on the basis of the objector's suspicion that post-confirmation obligations will not be carried out. See In re Future Energy Corp., 83 Bankr. 470, 487 (Bankr. S.D. Ohio 1988). The evidence supporting compliance with section 1129(a)(3) includes the courts' judicial notice of the approved disclosure statement and the certificate of service for the Creditor Plan on file and the testimony of the Proponents' witnesses that they intend to carry out the Creditor Plan to full consummation. Accordingly, the Creditor Plan complies with section 1129(a)(3).

6. There is no bankruptcy estate after confirmation of a chapter 11 plan and there can therefore be no administrative expense claims for post confirmation activities and costs. In re Frank Meador Buick, Inc., 65 Bankr. 200, 203 (D.W.D. Va. 1986); In re Barker Medical Company, Inc., 55 Bankr. 435, 436 (Bankr. M.D. Ala. 1985); In re Page, 118 Bankr. 456, 459 (Bankr. N.D. Tex. 1990).

7. The purpose of section 1129(a)(4) is to protect the integrity of the bankruptcy estate since attorney fees

and costs are subject to priority under section 507 and insure that holders of claims have the benefit of such information that might afford the claimants' decision to accept or reject the plan. See In re Future Energy Corp., 83 Bankr. 470, 488 (Bankr. S.D. Ohio 1988).

8. A statement in a chapter 11 plan that attorney fees and costs be subject to court approval is not necessary to achieve compliance with section 1129(a)(4). See In re Future Energy Corp. 83 Bankr. 470, 488 (Bankr. S.D. Ohio 1988).

9. Disclosure that preconfirmation and post-confirmation costs, expenses and attorney fees of the Proponents will not be borne by the bankruptcy estate is sufficient for the court to approve such costs, expenses and fees as reasonable under 11 U.S.C. § 1129(a)(4). See In re Texaco, Inc., 84 Bankr. 893, 908 (Bankr. S.D.N.Y. 1988). In addition, under Matter of Hargis, 887 F.2d 77, 79 (5th Cir. 1989), since the Court cannot order disgorgement of attorney fees that came from a source outside the bankruptcy estate, such costs and fees are approved as reasonable.

10. There is no bankruptcy code requirement that persons serving post-confirmation as the successor to the debtor have no conflicts of interest with the creditors.

11. Section 336 of the Internal Revenue Code does not apply to grantor trusts. See 26 U.S.C. § 336.

12. Voiding ab initio the January 16, 1991 sale of the Duval County Ranch eliminates any administrative expense claim due to any gain on such sale and the basis existing in the Duval County Ranch prior to the

foreclosure carries forward as DCRC's tax basis in the property. See Revenue Ruling 80-58, 198-1 C.B. 181.

13. Post-confirmation taxes are not recoverable as administrative expenses under 11 U.S.C. § 503. In re Holywell Corp., 911 F.2d 1539, 1544 (11th Cir. 1990).

14. A trustee appointed pursuant to a chapter 11 plan who is not appointed under 11 U.S.C. § 1104(a) is not a "trustee in a case under title 11 of the United States Code, or assignee", and is therefore not subject to the requirements of 26 U.S.C. §§ 6012 and 6151. In re Holywell Corp., 911 F.2d 1539, 1545 (11th Cir. 1990).

15. Since the Creditor Plan creates a nontaxable grantor trust, the Liquidating Trustee shall not be under any duty to prepare and file federal income tax returns (other than information returns) or pay income taxes on preconfirmation or post-confirmation income of any kind, whether from capital gains, operations, interest or otherwise and the duty to prepare and file federal income tax returns and pay federal income taxes shall be the sole responsibility of the Manges Debtors. See In re Holywell Corp., 911 F.2d 1539, 1541 (11th Cir. 1990); Stockton v. United States, 335 F. Supp. 984, 986 (C.D. Calif. 1971); In re Sonner, 53 Bankr. 859, 864 (Bankr. E.D. Va. 1985).

16. The filing of a petition in bankruptcy creates a legal estate comprising "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). In the case of a married debtor in a community property state, the bankruptcy estate includes all interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is under the sole equal or joint management and

control of the debtor. 11 U.S.C. § 541(a)(2). Community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by him or her before or during the marriage. Tex. Fam. Code Ann. § 5.61(c) (Vernon 1975); Carlton v. Estes, 664 S.W.2d 322, 323 (Tex. 1984). During marriage, property is presumed to be the sole management property of a spouse if it is held in that spouse's name or there is other evidence of ownership. Tex. Fam. Code Ann. § 5.24 (Vernon 1985). This Court has exclusive in rem jurisdiction over all property of these bankruptcy estates wherever located and by whomever held. 28 U.S.C. § 1334(d); 28 U.S.C. §157(a); Slay Warehousing Co. v. Modern Boats, Inc., 775 F.2d 619, 620 (5th Cir. 1985).

17. The joinder of Helen Ruth Manges, a nondebtor, is not necessary for this court to make in rem orders with respect to community property that is the sole or joint management community property or separate property of Clinton Manges because such property is property of the bankruptcy estate. 11 U.S.C. § 541(a)(2); In re Halub, 35 Bankr. 617, 619 (Bankr. C.D. Calif. 1982); Tex. Fam. Code Ann. § 5.61(c) (Vernon 1975); Carlton v. Estes, 664 S.W.2d 322, 323 (Tex. 1984). Since Helen Ruth Manges had actual knowledge of the Creditor Plan and an opportunity to be heard, and since the injunctive provisions concerning her under the Creditor Plan are in rem orders, no proceeding against Helen Ruth Manges is required to order her compliance with Creditor Plan provisions.

18. Under 11 U.S.C. § 1142, Bankruptcy Rule 7065, Federal Rule of Civil Procedure 65(d), and United States v. Hall, 472 F.2d 261, 265-66 (5th Cir. 1972), this court may issue orders to nonparties in the exercise of its

in rem jurisdiction over property of the estate binding upon those persons who receive actual notice of the order.

19. Since Helen Ruth Manges had actual notice of the Creditor Plan, she has not been denied due process. EEOC v. Pan American World Airways, Inc., 897 F.2d 1499, 1508 (9th Cir. 1990) (actual knowledge of the pendency of an action removes any due process concerns about notice of litigation); In re DCA Development Corporation, 489 F.2d 43, 47 (1st Cir. 1983) ("even where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the Bankruptcy Act"). See also In re Compton, 891 F.2d 1180, 1185 (5th Cir. 1990) (misscheduled creditor with actual knowledge of general bankruptcy not excused from missing dischargeability deadline).

20. Any party in interest may file an objection to a chapter 11 plan. 11 U.S.C. § 1128(b). When an objection to a chapter 11 plan is filed, the confirmation hearing is a contested matter. Bankr. R. 3020(b)(1); 9014. Federal Rule of Civil Procedure 19 (concerning joinder of parties) is not applicable to contested matters. Bankr. R. 9014. The procedure in chapter 11 is clear: a party in interest is not required to be "joined" in a confirmation hearing. One must file an objection under section 1128(b) in order to be a party. Helen Ruth Manges, as a party in interest with notice of the Creditor Plan, could have filed an objection but she did not. She has therefore waived any objections as to procedural irregularity. See In re Great Lakes Steel & Fabricating Industries, Inc., 83 Bankr; 1015, 1016 n.1 (Bankr. N.D. Ind. 1988); see also In re The Landing Associates, Ltd., 122 Bankr. 288, 292 (Bankr.

W.D. Tex. 1990); In re C.M. Turtur Investments, 93 Bankr. 526, 527 (Bankr. S.D. Tex. 1988); In re Prescott College, 10 Bankr. 316, 321 (D. Ariz. 1981); In re Gregory, 705 F.2d 1118, 1123 (9th Cir. B.A.P. 1983).

21. Only natural persons may have a homestead and corporations may not have a homestead. Tex. Const. art. XVI §§ 50, 51 (1876 amended 1973); Tex. Prop. Code Ann. § 41.002 (Vernon Supp. 1991); Shepler v. Kubena, 563 S.W.2d 382, 386 (Tex. Civ. App. --Austin 1978, no writ); Op. Tex. Atty. Gen. No. JM-612 (1986). Only individual debtors may claim a homestead exemption in bankruptcy. 11 U.S.C. § 522(b).

22. Parties in bankruptcy are bound by factual issues decided in prior judgments under the principle of collateral estoppel. Montana v. United States, 440 U.S. 147, 153 (1979); In re Shuler, 722 F.2d 1253, 1255 (5th Cir. 1984), cert. denied, 469 U.S. 817 (1984).

23. Substantive consolidation arises from the general equitable powers of the bankruptcy court under 11 U.S.C. § 105(a). In re Gainesville P-H Properties, Inc., 106 Bankr. 304, 305 (Bankr. M.D. Fla. 1989). The sole purpose of substantive consolidation is to ensure equitable treatment of all creditors. In re Augie/Restivo Baking Co. Ltd., 860 F.2d 515, 518 (2d Cir. 1988). The standard for granting substantive consolidation is that the creditors will suffer greater prejudice in the absence of consolidation than the debtors and any objecting creditors will suffer from its imposition. In re Steury, 94 Bankr. 553, 554-555 (Bankr. N.D. Ind. 1988).

24. Bankruptcy courts should consider the following factors when deciding whether substantive consolidation is proper:

(a) the presence or absence of consolidated financial statements;

(b) the unity of interests and ownership between the various corporate entities;

(c) the existence of parent and intercorporate guaranties on loans;

(d) the degree of difficulty in segregating and asserting individual assets and liabilities;

(e) the transfer of assets without financial observance of corporate formalities;

(f) the commingling of assets and business functions; and

(g) the profitability of consolidation at a single physical location.

In re Mortgage Investment Co. of El Paso, Texas, 111 Bankr. 604, 610 (Bankr. W.D. Tex. 1990).

25. A chapter 11 plan may provide for the settlement or adjustment of any claim belonging to the debtor or to the estate, 11 U.S.C. § 1123(b)(3), and a compromise involving claims of other parties may be

effected by a chapter 11 plan if it is fair and equitable. In re Texaco, Inc., 84 Bankr. 893, 901 (Bankr. S.D.N.Y. 1988).

26. There is no requirement under 11 U.S.C. § 1129(a)(11) that a finding be made that there be no need for the further reorganization or likelihood of liquidation of the debtor in the case of a creditor trust liquidating plan. 11 U.S.C. § 1129(a)(11); Matter of 47th & Belleview Partners, 95 Bankr. 117, 120 (Bankr. W.D. Mo. 1988); In re Pero Brothers Farms, Inc., 90 Bankr. 562, 563 (Bankr. S.D. Fla. 1988). In any event, the only test for feasibility in connection with a liquidating plan is whether the proponent can perform the plan provisions after confirmation. See In re Jorgenson, 66 Bankr. 104, 108 (9th Cir. B.A.P. 1986); In re Elm Creek Joint Venture, 93 Bankr. 105, 110 (Bankr. W.D. Tex. 1988).

27. It is a fundamental concept that the best evidence of what a property is worth is what it brings on the open market. In re Energy Cooperative, Inc., 109 Bankr. 822, 824 (N.D. Ill. 1989).

28. In the event of a post-vote modification of a chapter 11 plan, further disclosure is only required when the proponent either intends to solicit votes from previously dissenting creditors or when the modification materially and adversely affects creditors who previously voted for the plan. In re American Solar King Corp., 90 Bankr. 808, 823 (Bankr. W.D. Tex. 1988). A modification is material if it so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance. Id.

An order confirming the Creditor Plan shall issue in accordance with these findings and conclusions.

SIGNED and ORDERED ENTERED: June 7, 1991.

/s/Richard S. Schmidt
RICHARD S. SCHMIDT
UNITED STATES BANKRUPTCY JUDGE

After entry, copies to: J. Patrick Deely, Kevin M. Warburton, Sam Dibrell, Kent M. Rider, Arthur Zeitler, Jose N. Rangel, Larry Ludka, Margaret K. Hoffman, O'Neal Munn, John S. Warren, Jack Langlois, David D. Towler, Kathy Kirk, John E. Cooper, Richard L. Fuqua, Craig T. Cowgill, Bennett Fisher and Ben Head.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	NO. 89-01286-C-11
DEBTOR	§	

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	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

CLINTON MANGES,	§	
DEBTOR	§	NO. 89-01531-C-11

ORDER CONFIRMING FIRST AMENDED CREDITORS' PLAN OF REORGANIZATION OF SEATTLE FIRST NATIONAL BANK AND SEAFIRST AMERICA CORPORATION

After proper notice and a hearing, this Court has considered the First Amended Creditors' Plan of Reorganization of Seattle First National Bank and SeaFirst America Corporation under chapter 11 of the Bankruptcy Code filed by Seattle-First National Bank ("SeaFirst") and SeaFirst America Corporation ("SFA") [collectively "the Proponents") on January 29, 1991 (the "Creditor Plan") and finds:

EXHIBIT A

1. A copy of the Creditor Plan, its approved disclosure statement, the order approving the disclosure statement, and court-approved ballots were transmitted to all persons requiring notice.

2. The solicitation of votes on the Creditor Plan by the Proponents was proper in all respects.

3. The Creditor Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law. Specifically Classes 3, 5, 6, 7, 8, 9, 10, 17, and 18 are impaired and have accepted the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. §1129(a)(10).

4. The Creditor Plan complies with the applicable provisions of title 11.

5. The Proponents of the Creditor Plan have complied with the applicable provisions of title 11.

6. The Creditor Plan has been proposed in good faith and not by any means forbidden by law.

7. Each holder of a claim or interest that has not accepted the Creditor Plan will receive or retain under the Creditor Plan property of a value, as of the effective date of the Creditor Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date.

8. The Creditor Plan does not discriminate unfairly and is fair and equitable with respect to each impaired class of claims or interests that did not accept the Creditor Plan.

9. All payments made or to be made by the Proponents or the Liquidating Trustee for services or for costs and expenses in, or in connection with, the Creditor Plan and incident to the case are either approved by the Court as reasonable or are subject to the approval of the Court as reasonable.

10. The identity, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees, if any, of the successor to the debtor under the Creditor Plan after confirmation of the Creditor Plan have been fully disclosed, and the appointment of such person to such offices, or their continuance therein, is equitable, and consistent with the interests of the creditors and equity security holders and with public policy. Specifically, Gary Williams, a vice president at SeaFirst, has been appointed as Liquidating Trustee and a company to be formed by Michael Speed will be appointed by the Liquidating Trustee as Operator and their appointment is equitable and consistent with the interests of creditors and equity security holders and with public policy.

11. No insiders are being employed or retained by the Liquidating Trustee. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(B).

12. Confirmation of the Creditor Plan is not likely to be followed by the need for further financial reorganization of the debtor or any successor to the debtor under the Creditor Plan.

13. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9) with respect to the treatment of all known priority claims under 11 U.S.C. § 507.

14. There are no governmental rate changes proposed by the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. 1129(a)(6).

15. There are no retiree benefits under 11 U.S.C. §1114 applicable. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(B).

16. The principal purpose of the Creditor Plan in not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. The trust created by the Creditor Plan is a nontaxable grantor trust under subpart E of subchapter J of the Internal Revenue Code. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(d).

17. The effect of the abandonment of the Man-Gas and DCRC stock to Clinton Manges shall be nunc pro tunc as if Manges had owned the stock continuously and the Liquidating Trustee never owned the stock pursuant to Mason v. Commissioner of Internal Revenue, 646 F.2d 1309, 1310 (9th Cir. 1980).

Modifications

18. The following modifications to the Creditor Plan are hereby made and are approved by this Court:

a. The $1.3 million Creditor Fund shall accrue interest at the same rate for SeaFirst market rate savings accounts. Interest accrued shall supplement the Creditor Fund.

b. Paragraph IV.4.7 of the Creditor Plan is hereby changed to allow for an interim

distribution of up to fifty percent rather than thirty percent.

c. Exxon shall be entitled to a Class 17 claim for any royalty it is owed.

d. The Class 3 claimants who are to receive deferred payments shall receive interest in compliance with 11 U.S.C. § 1129(a)(9)(c) at the rate of 10% per annum.

e. The basis for any security for the Class 17 and 18 claimants is Tex. Bus. & Comm. Code § 9-319.

f. The Liquidating Trustee's duties shall include filing and reporting of severance taxes on oil and gas production.

g. The third sentence in paragraph VIII.1 of the Creditor Plan and the third sentence of Article X of the disclosure statement are changed to read: "After Motion Pursuant to the Creditor Plan and a hearing, the Court may eliminate or modify the continuous drilling obligation from the Mobil Lease on grounds of 'economic waste'."

h. The Liquidating Trustee shall pay out of the Creditor Fund to the United States Trustee the appropriate sum required pursuant to 28 U.S.C. section 1930(a)(6) on the Effective Date of the Creditor Plan and provide to the United States Trustee appropriate documentation including all disbursements for the relevant periods.

i. The basis for any security for the Class 18 claimants shall include section 52.136 of the Texas Natural Resources Code in addition to any security pursuant to Tex. Bus. & Com. Code section 9-319.

j. Article IV.4.4 at page 18 of the Creditor Plan shall be changed to read as follows:

> In the event that there is a shortfall in the Production Proceeds Account to meet the above uses of funds, Seattle First National Bank ("SeaFirst") will make advances to this account to accomplish the above uses and if such advances are made, SeaFirst shall be entitled to reimbursement, plus interest, from the Production Proceeds Account for the amounts advanced.

k. The Liquidating Trustee shall have the authority to execute all Texas Railroad Commission forms, including forms P-4, as are necessary to operate the Trust Property and carry out the purposes and intent of the Creditor Plan and the Manges Debtors shall execute all necessary Texas Railroad Commission forms, including forms P-4, as may be necessary to allow the Liquidating Trustee to operate the Trust Property and carry out the purposes and intent of the Creditor Plan.

l. Any interest of any Manges Debtor in any tank batteries and gas pipeline shall be transferred to the Liquidating Trustee under the Blanket Conveyance.

m. All payments made or to be made for services or for costs and expenses in or in connection with the case or in connection with the Creditor Plan and incident to the case, by the Proponents, the Liquidating Trustee, or persons issuing securities or acquiring property under the Creditor Plan for which no administrative expense application for compensation or reimbursement is filed are hereby approved as reasonable. Any such payments for which an administrative expense application for compensation or reimbursement is filed shall be subject to court approval as reasonable.

n. Class 14 is impaired.

o. Class 15 is impaired.

p. Gary Williams, a vice president of SeaFirst, is hereby appointed as Liquidating Trustee.

q. A company to be formed by Michael Speed has been chosen as Operator by the Liquidating Trustee.

r. No insiders shall be employed by the Liquidating Trustee. In the event that the Liquidating Trustee desires to employ any insider, an application to the Court shall be made pursuant to the Motion Pursuant to the Creditor Plan procedure described in Article IV.6.1 of the Creditor Plan.

s. Articles II.14 and II.15 of the Creditor Plan are hereby amended to provide that Marynell Maloney and Vannie Cook Estate shall be eligible for Class 4 unsecured deficiency claims to the extent that their claims may be allowed and to the extent that any security for their claims is not enough to satisfy their claims.

t. All payments owed to the Manges Debtors held by any purchaser of oil or gas, including funds held in suspense by Reata and Coastal, owed on the Confirmation Date shall collectively be termed "Confirmation Date Funds". Immediately upon the signing of this order, all Manges Debtors are enjoined from drawing or otherwise using debtor in possession funds and all financial institutions holding debtor in possession funds are hereby ordered to turn over all debtor in possession funds to the Liquidating Trustee upon presentment of this order. All purchasers of oil and gas or other persons or entities owing money to any Manges Debtor, upon presentment of this order, are hereby enjoined from paying any Manges Debtor, but shall instead pay the Liquidating Trustee all sums that would otherwise be due and payable to any Manges Debtor.

u. In recognition of the undisputed fact that at least $750,000 is owed in base ad valorem tax, the total Class 9 claims shall be allowed to the extent of $750,000. This $750,000 shall be distributed to the Class 9 claimants pro rata, or as they may agree, within thirty days of the Confirmation Date or within thirty days of the Liquidating Trustee's receipt of all Reata/Coastal

Confirmation Date Funds, whichever is later. These funds received by the Class 9 claimants shall reduce their claims accordingly. The Liquidating Trustee shall place all other Confirmation Date Funds in the Production Proceeds Account.

v. The source of payment for the $750,000 shall be the Confirmation Date Funds that are SeaFirst or SFA collateral. In the event that there is not at least $750,000 in Confirmation Date Funds that are SeaFirst or SFA collateral, then SeaFirst shall pay to Class 9 whatever additional sums are necessary to make the $750,000 payment when due.

w. The remaining portion of the Class 9 claims that are ultimately found to be allowed shall bear interest at the rate of 10 percent per annum from the Effective Date until paid.

x. If the collateral that is the source of payment to the allowed Class 9 claimants is not sold within 12 months of the Confirmation Date, then installment payments out of production proceeds shall be made to the allowed Class 9 claimants. The installment payment shall be structured such that the allowed Class 9 claims are paid in full within 36 months of the Confirmation Date. These installment payments shall be made in equal installments, escalating installments, diminishing installments, or any combination of the above, with a balloon payment or payments as is reasonable in the light of the availability of production proceeds without regard to any contribution by SeaFirst. The reasonableness of

the installment payment structure shall be by agreement or determined under the Motion Pursuant to Creditor Plan procedure described in Article IV.6.1 of the Creditor Plan.

y. The following sentences are added to Article IV.4.4(ii): Property taxes for 1990 shall be paid on the Effective Date. Property taxes for 1991 shall be paid on the Effective Date or when due and payable, whichever is later.

z. Article IV.2.1 of the Creditor Plan is hereby amended to read as follows:

> IV.2.1. Execution of documents to Effectuate the Creditor Plan. Within three days of the Confirmation Date, the Manges Debtors and Helen Ruth Manges shall execute the Manges Creditor Trust Agreement and Blanket Conveyance establishing the Manges Creditor Trust and transferring all Manges Debtor Estate property to the Manges Creditor Trust, thereby creating Trust Property. Clinton Manges shall retain all property listed as exempt in his schedules filed on about March 14, 1990. There shall be no homestead claim whatsoever in favor of anyone on the Duval County Ranch or on any of the estate or Trust Property. The Manges Creditor Trust Agreement and the Blanket Conveyance shall be substantially in the form as in Appendix 1 and 2, respectively. The Manges Debtors and Helen Ruth Manges shall be under a

continuing obligation to execute, within three days of demand, all documents of any kind to assist in effectuation of the purposes and intent of the Creditor Plan. The Court may order any other person at any time to execute all documents of any kind pursuant to section 1142 to assist in effectuation of the purposes and intent of the Creditor Plan. Pursuant to this provision, by order confirming the Creditor Plan, the Court will order all signatories necessary to carry out the provisions of the Blanket Conveyance to execute the Blanket Conveyance within three days of the Confirmation Date. In the event that the Manges Debtors, Helen Ruth Manges or any other person under an obligation herein to execute documents has not executed documents by the specified deadline, then the Court appoints Colin K. Kaufman to execute documents in the stead of any of the Manges Debtors, Helen Ruth Manges, or any other necessary signatory and such signature by the above appointee shall have the same legal effect as if the Manges Debtors, Helen Ruth Manges, or any other necessary signatory had executed the documents. Further, pursuant to section 1142, the Court orders Colin K. Kaufman to execute documents pursuant to the above appointment within three days of written demand by the Proponents' or the Liquidating Trustee's attorneys. In the event of an appointee execution of a document, there shall be no recourse whatsoever against the appointee, the Court,

the Liquidating Trustee, or the Proponents, although there may be recourse against the persons for whom the signatures are being supplied. In the event of any legal or physical incapacity preventing Colin K. Kaufman from executing documents, the Court may appoint a substitute or successor appointee to execute documents pursuant to this article. The Creditor Plan also shall be as legally effective to transfer and protect title as the Blanket Conveyance and may be publicly recorded instead of the Blanket Conveyance.

aa. Article I.4.10 of the Creditor Plan is hereby amended to read as follows: I.4.10 Confirmation Date."Confirmation Date" Means the eleventh day after the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. Do not confuse the Confirmation Date with the "Effective Date" the "Consummation Date", or the "Closing Date". "Pre-Confirmation" means that period of time prior to and including the date that the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. "Post-confirmation" means that period of time beginning after the date the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan.

bb. Article I.4.19 of the Creditor Plan is hereby amended to read as follows: I.4.19 Effective Date. "Effective Date" means the ninetieth day

after the Confirmation Date. If the Effective Date falls on a Saturday, Sunday or legal holiday under the Federal Rules of Civil Procedure, then the Effective Date shall be the next weekday that is not a legal holiday.

cc. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

dd. Notwithstanding any provision to the contrary, and except as herein provided, all Creditor Fund distributions shall be made within 36 months of the Effective Date (the "Distribution Deadline"). In the event that the Distribution Deadline arrives and all Creditor Fund collection and Eligibility matters are not completed, the Liquidating Trustee shall make Creditor Fund distributions to eligible allowed claimants on the Distribution Deadline and withhold only so much of the Creditor Fund as may be reasonably necessary to cover remaining Creditor Fund Collections and Eligibility Matters.

ee. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

ff. Upon the signing of the order confirming the Creditor Plan, the January 16, 1991 foreclosure on the Duval County Ranch is hereby rescinded

and made void ab initio and all liens in existence immediately prior to the foreclosure, including the Proponent's liens, are reinstated in the order of priority that existed immediately prior to the foreclosure. The Blanket Conveyance shall include a provision whereby the Manges Debtors convey the Duval County Ranch to the Liquidating Trustee. The Duval County Ranch shall be Trust Property, and the Liquidating Trustee shall treat the Duval County Ranch and its income as Trust Property under the Creditor Plan. Accordingly, the Liquidating Trustee shall sell the Duval County Ranch pursuant to the Creditor Plan and a lien shall attach on sale proceeds in favor of those creditors, including the Proponents, with liens against the Duval County Ranch immediately prior to the foreclosure. The effect of this provision shall be to make moot any adversary proceedings, appeals, or other actions or proceedings concerning the lifting of the stay on actions against the Duval County Ranch, the foreclosure on the Duval County Ranch, and the eviction from the Duval County Ranch. In the event that the confirmation of the Creditor Plan is overturned on appeal, denied upon reconsideration, revoked, or otherwise found invalid, then the foreclosure and eviction are reinstated in full and fee title to and the right to possession, dominion, and control of the Duval County Ranch automatically shall revest in Seattle First National Bank without the necessity for any action whatsoever by the Court or the Manges Debtors.

gg. The last unnumbered paragraph of Article IV. 2.2 is hereby amended to read: Failure

to cooperate fully shall be punishable by any available remedy and specifically by contempt of court; and all reasonable costs and reasonable attorney fees incurred in connection with any such motion for contempt may be assessed against the disobedient party in the court's discretion. The Liquidating Trustee shall be entitled to a writ of execution, writ of assistance, writ of ejection, forcible detainer, or forcible entry and detainer, upon application to the clerk.

hh. The Liquidating Trustee shall provide to the IRS any necessary information returns and shall provide such information to the Manges Debtors as may be reasonably necessary to enable the Manges Debtors to file income tax returns.

ii. Article IV. 6.c. and IV. 6.d. are hereby modified to read as follows:

c. To invest and reinvest the Trust Property in any demand deposits.

d. To enter into any transaction with respect to the Trust Property despite the fact that another party to any such transaction may be the Proponents.

jj. This liquidating trust shall terminate 36 months from the Effective Date unless the Liquidating Trustee, in his sole discretion, determines that an extension is necessary to complete unfinished duties.

kk. Production Proceeds income shall be distributed annually to SeaFirst except to the extent reasonably necessary to meet Creditor Plan obligations.

ll. In the event that all allowed claims are paid in full, any remaining Trust Property or Creditor Fund money shall revert to the Manges Debtors pro rata.

mm. Notwithstanding any provision that may appear to the contrary, the conveyance of bankruptcy estate property by the Manges Debtors to the Liquidating Trustee pursuant to the Creditor Plan and Blanket Conveyance shall be subject to liens and encumbrances. The Liquidating Trustee shall then sell the Trust Property free and clear of liens with such liens of allowed secured creditors attaching to the sales proceeds or net sales proceeds as provided in the Creditor Plan.

19. The modifications in paragraph 18 supersede all modifications that appeared in the Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof signed by the Court on March 11, 1991.

The Creditor plan filed by Seattle-First National Bank and SeaFirst America Corporation on January 29, 1991, a copy of which is attached hereto, is confirmed as modified herein.

Signed and ordered entered this date: June 7, 1991

BY THE COURT

/s/ Richard S. Schmidt
RICHARD S. SCHMIDT
UNITED STATES BANKRUPTCY
JUDGE

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	
	§	NO. 89-01286-C-11
DEBTOR	§	

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	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

CLINTON MANGES,	§	
	§	NO. 89-01531-C-11
DEBTOR	§	
	§	

ORAL RULING ON CONFIRMATION OF
FIRST AMENDED ORIGINAL CREDITORS' PLAN
OF REORGANIZATION OF
SEATTLE FIRST NATIONAL BANK
AND SEAFIRST AMERICA CORPORATION

On May 29, 1991, at approximately 4:20 pm., the Honorable Richard S. Schmidt, United States Bankruptcy Judge, issued the following oral ruling on confirmation of First Amended Original Creditors Plan of Reorganization of Seattle First National Bank, which has been transcribed by the plan proponents from the Court's official tape:

EXHIBIT B

THE COURT:

Allright. Presumably, this is all who were interested, or are interested enough to get on the phone call or knew how to get on the phone call. So, I have, I have been working with this case since 1989 when it was filed in October, on October 2nd of 1989, the beginning of the case. We have, this is the second time we've come up on confirmation. We've had hearings on, on this confirmation on the May 1st, 13th, and the 20th and then again this morning arguing on, on confirmation of this particular matter. The case is nearing the two year mark, although I guess its about a year and a half old. The standard for under Timbers, as I understand it, is one business cycle for the normal time for reorganization. The, we have not, we, we went beyond the debtors' exclusivity period obviously without a reorganization. We had a debtors plan that was, that was filed in June of 1990, I think certainly well within the standards for, for the amount of time involved in, in handling a case of this size and this complexity. Although that issue could be tempered by the fact that the deadline, this, this matter has really been worked out on a couple of occasions prior outside the bankruptcy in basically what were workouts, so that in essence, they came to the bankruptcy court after having failed to perform under plans that were done outside of bankruptcy pursuant to agreed orders in another court. Confirmation was denied on the debtors plan on December 5, 1991 [sic.]. The creditors plan was filed before that on 11/30/91. There has been a motion to relief, for relief, that's been passed along throughout this case. I, I, I hesitate to make statements like this, but it seems to me that basically the only reason to me that the stay hasn't lifted to date is the fact that the creditor hasn't pressed it. The creditor has chose instead to push forward

on the confirmation of the plan. That the, the, in terms of what I understand the standards are in the Fifth Circuit, for sure, and perhaps from the Supreme Court, that this case is well outside the, the limits of, of what, of providing adequate protection by virtue of, of adequate protection in failing to lift the stay. However, that issue is not before me today but I think it plays in my decision of what to do because I think that my decision is not a question of, is this the best possible plan that we can confirm, which you never do that, you only, the court is required to look at, is the plan confirmable. In this particular case, I think it makes it even more concerning because it seems to me that the plan isn't confirmable, then the stay is going to have to lift and, and we either go away, this case goes away by loss of all of its assets, and, the creditors get nothing, those, at least those that don't have some sort of security. It's not really a good case to convert to chapter 7, on, to be perfectly honest because I'm not so certain why a trustee should be thrust in between these two semi-warring parties. The, the suggestion was made just like a West Texas battle over what people were grabbing onto either side. I, I don't really think that. I don't believe that the two parties here have got a hold of each other until death, I, I think that the, both sides, I think that Mr. Manges has ahold of his property and his, and his assets that he wants to hold on until, until, with, with all due voracity and I think that the bank wants to get paid. But I, I don't think, I have not sensed that kind of war. This has been a hotly fought battle, but there has been accommodation, I, I have found by both sides in this particular case, and, this has not been a Rambo operation. At least it didn't seem that way to me, of course I wasn't at the depositions. But, but in terms of the way both parties have, have, have responded in court, both sides have responded exemplary in court throughout, throughout

this battle. And it's remarkable how well Mr. Manges has been able to come forward with high quality legal talents even in this, this particular hearing in which they were required to get up to date on, on some very complicated issues and present in a very credible fashion the defense that they did, in this, in this hearing. And, of course on the other side, the bank, I understand their firm went through some reorganization in their bankruptcy section at the same time this was going on, so they were having to deal with complicated legal issues and did a very credible job on their side. And, I, I say that not because I, I'm trying to strike points with the lawyers but only because I, they don't get, they don't get that kind of, they probably didn't get mentioned enough. But there has been no one who has laid back in this case. The lawyers have worked hard, the parties have worked hard, and for various reasons I am going to confirm this plan, then I'll take the mystery out of my ruling. But its, its not an easy thing to do, because it affects people and it affects lots of different rights. But to me in the context of all of the alternatives that, that this is the best, this is, I think, the most fair and equitable treatment of the creditors, and qualifies under the code for confirmation. I'm going to go over, I'm going to do this in an abbreviated fashion so we don't sit here all day. I'm going to, I have reviewed the findings of fact that, that have been filed by the bank but I am going to first make the following comments, which are part of my findings of fact and conclusions of law and then adopt the findings of fact and conclusions of law that the, that the bank has submitted. But with these additions, first of all, and I'm going to deal with them in subject matters.

As to the issue concerning the tax, tax consequences of confirmation. A great deal of issue was made over the, over the grantor trust provision, section 336, whether it

applies, etc. There are no cases or, or regulations on 336 and it's my opinion after reviewing the law and the argument that we've had that grantor trusts are viable entities after the tax reform act, that, that this particular plan does provide a grantor trust, for a grantor trust, which would pass tax consequences on to the grantor and not to the trust. That the operation by the, by the trustee of the oil and gas fields as contemplated in the, in the trust, will, is reasonable and necessary, especially in consideration of the peculiar aspects of operation of oil and gas in that the, in that the res itself can be lost if its (sic) not used, in both from a, from a geological standpoint, and also from a lease obligation standpoint so that it is necessary, and in fact prudent and necessary, for those operations to continue and that should not effect the tax consequences of the grantor trust. That particular limit of operation of those fields. Furthermore, it seems to me, that the rescission contemplated, that the rescission contemplated by the, the confirmation of this plan can be effectuated. That the, that in some respects it is a legal fiction that has created the rescission, but the rescission will provide for rescinding the operation of the foreclosure will be provide for putting the estate back into possession of the property and immediately transferring it to the trust and that the existence of the lease, will not be sufficient to, to, to outweigh, to cause it to be taxed any, any differently, and that the, the lease treatment can be squared away a number of ways but by re-leasing the property or, or by simply even making it subject to it but either way its de minimis and will not affect the tax consequences of the, in the operation of this. Furthermore, the, the trust as set up will not be treated as a corporation, but while it certainly could be in the future treated as a corporation, the bank runs its own risk in doing so, since it presumably could, could be held liable for the taxes if in fact the trustee

begins to operate outside the, the parameters set up and provided for in the tax code as well as in the trust agreement and so they do so at their own peril. But, as contemplated the, the trust will not be treated as a corporation, but will be treated as a grantor trust.

As respect to Mrs. Manges. The testimony was uncontroverted that she had notice of this particular, of this particular plan confirmation, that she, she chose not to participate in it, that she was not served, however, with any, any, was not specifically served with any of the, confirmation documents. However the, all of the property that is subject to the confirmation and subject to operation under the, under the provisions of the, of the plan is property of the estate since it is, community property or property under the separate administration control of Mr. Manges or his separate property. So therefore all of the property is properly the subject of this, of this court, and property within the jurisdiction of the court and all of the obligations sought to be enforced are in rem obligations, not the personal obligations of Mrs. Manges. The bank has also sought to, gratuitously I guess, say that they wouldn't require her to, to sign any of the documents. I guess if they want to eliminate that appeal, that appeal position, they can do that if they want to, but it seems to me that there is ample authority for, for requiring her to effectuate the sale of the documents since these are all property of the estate and in rem obligations that we're talking about especially in consideration of the fact that she had notice of the bankruptcy for sure and had actual notice of this confirmation going on over the last month.

The issue of appeal. The appeal before the Fifth Circuit on the on the foreclosure as I understand it has not been stayed. This court does have the authority to go

forward with confirmation regardless to what that does to that appeal. Perhaps if it, if this were a debtors plan and it was overturning the appeal or, or there might be some concern. But in fact the effect of this plan is to in fact, in fact overturn the foreclosure as though it never happened, which is what the debtors are seeking on appeal anyway. So that it seems to me that, that I have the authority to go forward despite the appeal in the Fifth Circuit.

The homestead issue. After reviewing the record, I believe that I am bound by the previous findings of the previous courts on at least two occasions that the property is not the homestead of the debtor so that is not an issue since it is, has been decided by a previous court specifically.

Consolidation. There was testimony concerning, by the officers and director, the test for consolidation is different from, in the context of confirmation of a plan, than, than it was earlier in the case where the effect would be significantly different. Here, in the the, the test should be construed in accordance with the case law the, and I agree with the case out in the Western District of Texas, whose name escapes me at the present time I don't know whether its Ayers or Clark, probably one of those two, the prolific writers of the Western District. The, but the testimony in this case does seem to meet all of the tests set out in that case and furthermore in context of the, in the context of the benefit to all of the creditors, it seems to me that there is little impact other than, in the context of this case, it gives the debtors, the creditors a, at least a good prospect of some recovery which, there standing alone, none of these cases, it doesn't seem to me might be worked out with the exception of perhaps the Man-Gas case itself. But, but here it seems to me the, the, the plan

pays far more than, than, chapter 7 would provide for even those creditors. So that, in the context of this, this plan, it seems to me that consolidation is appropriate. The only negative, possible negative, impact of consolidation is the potential impact that the debtor might have, have on the debtor, in elimination of his opportunity to effectuate a, an election to convert the S corporation to a, whatever, C corporation or whatever its called. The effects of that can be minimized by the fact that I'm not signing the order until Friday so that at least a couple of days for him, if he wants to, to make the election prior to confirmation he can do that. I'm not saying that, that the consolidation mandates that he can no longer make that election, but he certainly can make it within the next two days if he wants to.

The amendments. The amendments are set out in detail in the findings of fact and conclusions of law, well pardon me, in the order, the proposed order of confirmation that everyone has received a copy of. Most of those are very technical in nature and don't really effect anything other than, other than things such as shortening of the, the restrictions on the trustee, pointing out exactly who the trustee was going to be, pointing out exactly who would be the operator, things of that sort, and are not material. The, none of them are material to anyone voting in favor of the plan and, nor, nor does it, do I believe that, that the amendments are detrimental. It seems to me that the only one that, that we would need to be concerned about, in, in terms of materiality would be the, the amendment which provided for the, the revocation of the, of the, or the rescinding of the foreclosure. Those parties who that might materially affect, seems to me, are the state land office who is here and voting for the plan and certainly understands the effect of that and has no

objection to it and the IRS, who is here, understands the plan, and has not expressed any objection to it. So whatever negative tax consequences of that foreclosure would be done away with by virtue of the confirmation of this plan, it makes sense for the IRS not to object since they are going to get the bird in the hand of the $750,000 claim when this plan is confirmed, whereas if it's not confirmed, they, they may never get that, they may never get anything out of the foreclosure either since the property has, may not be any equity in it. So I think the IRS has made an informed decision not to object to this plan. Whether they had sent Mr. Ludka here, even though he is not from the department of justice or the IRS or whether they made it up at a higher level, I don't know. But I think its the right decision that they made and I think that they made that decision and they have certainly been here. Furthermore, all of the people have had this amendment since the first of May, the hearing has continued over a period of a month so that any, any lack of notice that anyone has had seems to me has been cured by the fact that I have stretched this hearing out in order to give everyone a time to respond if they so chose and it seems to me if they didn't respond that's their problem.

So with those specific findings, I'm not going to read into the record these findings, although I have gone over them in detail. I would now adopt, in addition to these specific comments I've made, I'm now going to adopt the thirty-two pages of findings of fact and conclusion of law by the, provided by the, by the bank. I have not reviewed in detail, other than the modifications, the order confirming the plan and am not prepared to say that this is exactly the order that I'm going to sign confirming the plan, so I will review that over the next couple of days and prepare the order, which I will sign some time on Friday.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7328

IN THE MATTER OF:
CLINTON MANGES,

Debtor.

CLINTON MANGES, DUVAL COUNTY RANCH C
AND MAN-GAS TRANSMISSION,
Appellants-Cross Appellees,

versus

SEATTLE-FIRST NATIONAL BANK and
SEAFIRST AMERICAN CORPORATION,
Appellees-Cross Appellants.

****

IN THE MATTER OF: DUVAL COUNTY RANCH C,
Debtor.

CLINTON MANGES, DUVAL COUNTY RANCH C
and MAN-GAS TRANSMISSION,
Appellants-Cross Appellees,

versus

SEATTLE-FIRST NATIONAL BANK and
SEAFIRST AMERICAN CORPORATION,
Appellees-Cross Appellants.

****

IN THE MATTER OF: MAN-GAS TRANSMISSION,
Debtor.

CLINTON MANGES, DUVAL COUNTY RANCH C
and MAN-GAS TRANSMISSION,
Appellants-Cross Appellees,

versus

SEATTLE-FIRST NATIONAL BANK and
SEAFIRST AMERICAN CORPORATION,
Appellees-Cross Appellants.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION(S) FOR REHEARING

(September 27, 1994)

Before KING and SMITH, Circuit Judges and KENT*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed the above case is denied. The mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

*District Judge of the Southern District of Texas, sitting by designation.

REHG-2
Rev. 7/1/94

* * * * * * * * * * * * * * *

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 94-1111

In The

Supreme Court of the United States

October Term, 1994

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors,

Petitioners,

v.

Seattle-First National Bank and SeaFirst America Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

This case arises from the Chapter 11 debtor petitioners' efforts to reform a substantially consummated plan of reorganization to impose a substantial tax burden on their creditors even though the petitioners are not injured by the tax provisions of the plan. More specifically, the following issues are presented:

1. Was the court of appeals consistent with the standard established by the circuit courts of appeal and this Court in dismissing the appeal as moot under the circumstances?

2. Did the court of appeals err in refusing to remand the case for the limited purpose of allowing the petitioners to conduct discovery on the mootness issue?

3. Did the court of appeals' dismissal of this appeal on mootness grounds, despite petitioners' numerous, repeated requests for a stay, violate the due process principle of "fundamental fairness" as well as the "fresh start" policy of the Bankruptcy Code?

LIST OF PARTIES

The participants in the proceedings below were:

Petitioners:

Clinton Manges

Duval County Ranch Company

Man-Gas Transmission Company

Respondents:

Seattle-First National Bank

SeaFirst America Corporation

SeaFirst America Corporation is a wholly owned subsidiary of Seattle-First National Bank, which is a wholly owned subsidiary of Seafirst Corporation, which is a wholly owned subsidiary of BankAmerica Corporation.

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No. 94-1111

In The

Supreme Court of the United States

October Term, 1994

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors,

Petitioners,

v.

Seattle-First National Bank and SeaFirst America Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, Seattle-First National Bank ("**SeaFirst**") and SeaFirst America Corporation ("**SFA**"), respectfully oppose the Petition for Writ of Certiorari in this case because the Fifth Circuit Court of Appeals correctly followed controlling law in dismissing the appeal on the grounds that "substantial consummation" of the plan of reorganization and the inability to provide the relief requested without imposing inequitable consequences rendered the appeal moot.

OPINIONS AND JUDGMENT BELOW

The Respondents incorporate by reference the Petitioners' statement of opinions and judgments below.

JURISDICTION

The Respondents incorporate by reference the Petitioners' statement of jurisdiction.

STATUTE INVOLVED

11 U.S.C. § 1127(b) (West 1993):

> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

STATEMENT OF THE CASE

The Proceedings Below

The Petitioners here and debtors below were Clinton Manges ("**Manges**"), Duval County Ranch Company

("**DCRC**"), and Man-Gas Transmission Company ("**Man-Gas**") (collectively, the "**Manges debtors**"). Manges was the sole shareholder of DCRC and Man-Gas. DCRC's principal asset was the 98,000 acre Duval County Ranch (the "**Ranch**"). Working mineral interests interspersed throughout 140,000 acres in Duval and Webb Counties, Texas were the principal assets of Man-Gas. The Manges debtors sought protection from their creditors under the Bankruptcy Code beginning in 1989. After twenty-one months of refuge in the United States Bankruptcy Court for the Southern District of Texas sitting in Corpus Christi, the bankruptcy court confirmed a liquidating plan of reorganization proposed by creditors SeaFirst and SFA (the "**Creditor Plan**").

The court issued findings of fact and conclusions of law (Petitioners' App. at 49-80), including: (a) that the Creditor Plan was proposed in good faith (No. 13); (b) that the principal purpose of the Plan was not the avoidance of taxes (No. 38); and (c) that there was no equity in any of the property of the estates subject to liens (No. 48). The Creditor Plan created a liquidating trust to hold title to and sell the Manges debtors' assets (the "**Trust**"). The Creditor Plan also designated the Trust as a grantor trust so that any income tax from the gain on sales of certain assets would be absorbed by the debtors' tax attributes. The Trust is not a party to this appeal.

The Manges debtors and one unsecured creditor[1] appealed to the district court. (R.E. 6)[2]. In designating the record, the Manges debtors identified twenty-seven appellate points and contended that thirty-eight of the bankruptcy court's findings of fact were clearly erroneous. (R. 0830). They filed emergency motions for a stay pending appeal in the bankruptcy and district courts. (R. VIII.14). Both courts rejected the attempts to stay implementation of the Creditor Plan, as did the Fifth Circuit Court of Appeals when the appellants sought a writ of mandamus to compel the district court to issue a stay. *In re Duval County Ranch Co.*, No. 91-2764 (5th Cir. July 31, 1991). The bankruptcy court outlined many reasons for denying a stay in a six page order. Appendix at A-6. The district court held a hearing, heard the testimony of several witnesses, reviewed the documentary evidence, heard the argument of counsel for various parties, and considered extensive memoranda of law. Appendix at A-11.

---

[1] The Law Offices of Royal D. Adams, Manges' counsel in pre-bankruptcy litigation.

[2] The record below contains four classes of reference: (a) Appellants' Record Excerpts, designated as **R.E.**; (b) the district court record, designated **R.** followed by four-digit page numbers (*e.g.*, **R. 0001** is page 1 of the record); (c) transcripts and pleadings, designated by Roman numerals for the volume followed by a page number (*e.g.*, **R. XIII.396** is page 396 of volume 13 of the transcript); and (d) documents from the bankruptcy court included in the appeal to the district court, designated by exhibit references in capital letters (*e.g.*, **R. Ex. N.31** is document 31 in the bankruptcy court's Exhibit N).

In the district court, the Manges debtors submitted a 76-page principal brief urging fourteen grounds for reversal. (R. 0706). Also during the course of the district court appeal, SeaFirst and SFA moved to dismiss the appeal under the mootness doctrine. (R. 0382). On May 3, 1993, the district court denied this motion because the Ranch and mineral interests had not yet been sold, but affirmed the confirmation order. (Petitioners' App. at 23-32) (R. 0084).

On May 12, 1993, the Manges debtors appealed to the Fifth Circuit Court of Appeals. (R. 0061). On May 14, 1993, they sought from the district court and were denied an emergency stay of the Creditor Plan. (R. 0033; R. 0031). On May 24, 1993, they filed an emergency motion for stay in the court of appeals, which was denied. On June 3, 1993, SeaFirst and SFA filed a notice of appeal of the district court's denial of their motion to dismiss under the mootness doctrine. (R. 0001).

On September 7, 1993, the Manges debtors filed an amended motion for stay of the Creditor Plan pending appeal. Following a response to this motion by SeaFirst and SFA, the court of appeals denied the amended request on September 15, 1993.

In their principal brief to the court of appeals, the Manges debtors continued to seek a complete reversal of the bankruptcy court's order confirming the Creditor Plan. The Manges debtors' principal argument concerned the impact on the Creditor Plan of this Court's decision in *Holywell Corporation v. Smith*, 503 U.S. ___, 112 S. Ct. 1021 (1992), which was issued nine months after confirmation

of the Creditor Plan. In response, SeaFirst and SFA pointed out that:

* the IRS did not oppose the Creditor Plan;
* the *Holywell* plan neither addressed the taxable status of its liquidating trust nor the trust's obligations regarding post-confirmation return filing;
* the Creditor Plan specifically addressed these matters and the IRS did not object or appeal, thereby binding the IRS; and
* any failure of the bankruptcy court to anticipate this Court's decision in *Holywell* constituted harmless error since there was no evidence that Manges would face any post-confirmation income tax liability and, even if there had been such evidence, the record established that any tax liability most likely would not exceed his tax attributes.

On December 16, 1993, the Ranch and mineral interests were sold by the Trust. On January 18, 1994, SeaFirst and SFA filed their reply to the Manges debtors' response on the mootness issue. That brief disclosed the December 16 sale of the properties and asked that the appellate court take judicial notice of the certified copies of deeds and assignments executed by the Trust to the third-party purchasers.

On February 15, 1994, the Manges debtors moved to remand the case to the district court for discovery on the mootness issue. They complained about the lack of knowledge regarding the transaction or sale documents that resulted in the filing of the deeds and assignments provided to the court earlier. In response, SeaFirst and

SFA supplied executed copies of *all* agreements between the purchasers of the Ranch and mineral interests and the Trust and Respondents. Accompanying those documents were declarations under penalty of perjury verifying both the documents' authenticity and the fact that they comprised all agreements concerning the sale and transfer of the Ranch and mineral interests (Appendix at A-1 through A-4), which were filed with the appellate court and served on the Manges debtors.

The motion to remand was denied on March 11, 1994. Oral argument on the appeals took place on May 3, 1994, and, in a written opinion concluding that it would be "plainly inequitable" for the court to consider the merits of the appeal, the appeal was dismissed on August 29, 1994. *Matter of Manges*, 29 F.3d 1034, 1044 (5th Cir. 1994) (Petitioners' App. at 1-22). The Manges debtors' petition for rehearing was denied on September 27, 1994 (Petitioners' App. at 107-09) and their Petition for Writ of Certiorari followed.

Statement Of Facts

Beginning in about 1980, SeaFirst loaned millions of dollars to Manges and Man-Gas. DCRC guaranteed the loans. The loans went into default, SeaFirst sued the Manges debtors, and a 1985 settlement resulted in an agreement by the Manges debtors to make certain payments. The revised debtor-creditor relationship included as collateral DCRC's 98,000 acre Duval County Ranch and extensive mineral working interests in Duval and Webb Counties, Texas owned by Man-Gas.

The Manges debtors soon defaulted on the 1985 settlement, SeaFirst sued them in 1986, and reached a settlement in 1988. The 1988 settlement included a final judgment, on which the bank could execute in the event of default, and required monthly payments in excess of $200,000 per month for one year and a balloon payment in August 1989 of $30 million. The Manges debtors defaulted on the last monthly payment and the balloon payment and SeaFirst set in motion a judicial sale of the Ranch and mineral interests. DCRC interdicted the judicial sale by filing a Chapter 11 bankruptcy petition. *Seattle-First National Bank v. Manges*, 900 F.2d 795, 797 (5th Cir. 1990). Involuntary petitions against Manges and Man-Gas followed shortly thereafter. Those cases later were converted to voluntary Chapter 11 cases.

The Manges debtors admitted to owing over $70 million to secured creditors and owning slightly over $33 million in assets. (R.0337). Though SeaFirst was the largest creditor of the estates, it was not the only creditor holding a significant claim: according to their liquidation analysis, the Manges debtors owed over $4.7 million in *ad valorem* taxes on the Ranch and mineral interests. (*Id.*). The Manges debtors also admitted that unsecured creditors held pre-petition claims: (1) against DCRC of $2,022,769 (R. Ex. E); (2) against Man-Gas of $1,788,431 (R. Ex. F); and (3) against Manges of $2,657,454. (R. N.33).

The bankruptcy court held hearings on confirmation of the debtors' "Revised Third Amended Plan of Reorganization" on January 15, 1991. (R. Ex.P. at 4). That same day, the debtors defaulted on a court-ordered payment to SeaFirst, triggering the lifting of a temporary stay that had prevented the judicial sale of the Ranch ordered by

the federal district court in San Antonio. (*Id.* at 6). SeaFirst purchased the Ranch on January 16, 1991, at a sale conducted by the United States Marshal. Since their plan depended on DCRC's ownership of the Ranch, the debtors then proposed a "Third Modification to Revised Third Amended Plan of Reorganization." (*Id.*). After a hearing on this version, the court denied confirmation, concluding that the proposal: (a) was not feasible; (b) violated the absolute priority rule; (c) failed to give secured creditors the indubitable equivalent of their claims; and (d) was not fair and equitable. (*Id.*). The Manges debtors did not appeal the denial of confirmation of their plan.

While the Manges debtors were proposing plans, amended plans, revised amended plans, and modified revised amended plans, SeaFirst and SFA submitted their own plan. (R.E.10). The basic provisions of the Creditor Plan were straightforward. The January 16, 1991, Marshal's sale would be rescinded thereby revesting title to the Ranch in DCRC's estate. A liquidating trust ("**Trust**") would be established, into which all estate property would be transferred. (Petitioners' App. at 54, para. 17). A bank officer would serve as trustee without charge to the Trust. (*Id.*). The stock of DCRC and Man-Gas would be abandoned to Manges. (*Id.* at 64, para. 46) Manges was given time to terminate the subchapter S election for Man-Gas thereby making DCRC and Man-Gas "C" corporations. (Petitioners' App. at 60, para. 39(c)). The Trust would collect all assets of the Manges debtors, maintain them until they could be sold, and then sell them for the benefit of the creditors. (*Id.* at 54, para. 17). Proceeds from the sale of an asset would reduce debt secured by that

asset, and any remainder would be distributed among allowed unsecured creditors. (R.E.10 at 10). The claims of all ad valorem taxing authorities would be paid in full following confirmation. (*Id.* at 8-9). The secured claims of SeaFirst and SFA were to be paid after the sale of certain assets. To the extent sales proceeds did not satisfy all of SeaFirst's claim – which was anticipated – the estimated $36 million unsecured portion of its claim would be subordinated voluntarily to the claims of all other unsecured creditors, and would not be paid unless and until all creditors' claims in Classes 1-5 (administrative expense, taxes, wages, and unsecured claims) and 16 (small claims) are satisfied in full. (R.E. 10 at 9). SeaFirst also agreed to pay the over $500,000 in Priority Government Claims, of which the IRS was owed over $300,000.

Funds to pay administrative expense and general unsecured claims would come from: (1) a $1.3 million cash contribution donated by SeaFirst; (2) recovery from post-petition litigation; and (3) sales proceeds in excess of existing secured claims. (R.E. 10 at 18-19). In addition to paying administrative expense claims, which included the Manges debtors' attorney fees, SeaFirst waived its own administrative expense claim for unpaid adequate protection and contempt awards, estimated to be between $1.7 and $2 million. (R.IX.86).

The Creditor Plan was supported by over 90% of the non-insider creditors, and by over 96% of all claims against the estates. Twice during the confirmation hearings – at both the commencement and the close of the evidence – the IRS, which had objected to the Creditor Plan, withdrew its objections. (R.IX.10; XII.396).

A central feature of the Creditor Plan was the designation of the Trust as a grantor trust, which imposed any post-confirmation income tax liability on the "grantors" as opposed to the Trust and creditors. This potential tax liability was only theoretical, however, since the undisputed evidence resulted in these findings by the bankruptcy court:

> (c) There should not be any significant post-confirmation income tax liability to Manges due to the availability of tax attributes, the value of the collateral, the availability of subchapter S termination, and the lack of personal liability to Manges for DCRC's taxes.
>
> (d) Even in the event that the debtors are faced with post-confirmation tax liability, the Creditor Plan is not unfair or inequitable since the debtors have had the benefit of the prepetition use of money and property without the burden of paying taxes.

June 7, 1992, Findings Of Fact And Conclusions Of Law. (Petitioners' App. at 60). The conditional nature of the court's finding was due to the fact that, despite extensive testimony and documentary evidence on the issues of values and tax matters, virtual certainty was impossible because Manges had not filed a tax return since 1982. The evidence below was that Manges had at least $11 million in loss carryovers (R.XI.117-18) and that the value of property contributed by him to the Trust was about $2.3 million (Ex.T; R.0337).

Since May 1991, the Trust worked toward satisfying the debtors' almost $80 million in debts with less than $35

million in assets. Unrebutted evidence presented to the district court showed that the Trust paid $1,529,928.88 in claims between confirmation and September 1992. (R.0402-0403). Also in that time, the Trust spent over $580,000 repairing and maintaining the Ranch and over $2 million in repairs and operating expenses connected with oil and gas production from the Ranch. (R.0403-0407). In January 1992, the Trust executed a two-year farm-out agreement of 50,000 acres of mineral land to a Houston oil company, which in turn farmed out acreage to Texaco and Exxon. (R.0408). The Trust also sold working interests, executed oil and gas leases, and entered into gas purchase contracts. (R.0408-0409). In December 1993, the Trust sold the Ranch and mineral interests to a third party for $28.5 million. Only minor assets remain in the Trust.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY DECIDED TO DISMISS THE APPEAL ON MOOTNESS GROUNDS BECAUSE THE PLAN WAS SUBSTANTIALLY CONSUMMATED AND IT WOULD BE INEQUITABLE TO GRANT THE RELIEF REQUESTED

When they proposed the Creditor Plan, SeaFirst and SFA did not write on a blank slate. For almost ten years, they had litigated with Manges. They knew that, with Manges in charge, nothing good would happen to any creditor. Thus, they proposed the Creditor Plan, which not only required them to give up a large administrative expense claim and subordinate all their unsecured claim

to others, but called for them to *donate* almost two million dollars for the benefit of other creditors. All of this they did not only to benefit those creditors who had given money, goods, and services to the Manges debtors and received nothing in return, but to ensure that valuable property, including a 150-square-mile ranch, would not lay fallow any longer.

Similarly, the creditors who supported the Plan remembered the treatment they had received from Manges. Among these were the local *ad valorem* taxing authorities, whose school budgets and road projects had struggled to get along without taxes from 98,000 acres of property for almost 15 years. Included also was the IRS, which understood that the Creditor Plan offered it the only chance of recovering the hundreds of thousands of dollars of payroll taxes Manges had ignored. (*See* Petitioners' App. at 106). Thus, having heard all the testimony about the Manges tax attributes, the Service agreed not to look to the Trust for income taxes after confirmation. These and other creditors knew what Manges would and would not do had his plan been confirmed, and they rejected it soundly. SeaFirst's plan, albeit perhaps not perfect, offered so much better treatment that they accepted it overwhelmingly.

Finally, the bankruptcy court did not suffer from amnesia when it issued the confirmation order. Patiently, it had given the Manges debtors chance after chance to propose a legitimate plan, refusing to lift the stay long after the exclusivity period expired. In the meantime, it observed Manges time and again ignoring adequate protection orders and using cash collateral without permission. There can be no claim, at least made honestly, that

the bankruptcy court denied Manges any opportunity to emerge from Chapter 11 on his own terms. But when those terms were illegal and unfair, the court had no choice but to deny confirmation to the debtors' plan. Taking up SeaFirst's proposal, the court saw the last, best hope for relief to *all* parties. With the landslide votes of the creditors, and following days of hearings, the court confirmed the Creditor Plan and allowed it to go to work.

Since then, the Trust has done everything necessary to fulfill its duties and was able to complete the sale of the last major assets of the Trust. There is light at the end of the tunnel. The Manges debtors should not be allowed to extinguish it.

The Manges debtors' "Statement Of The Case" is generally inaccurate and misrepresents the most important fact, which is uncontroverted in the record, and was significant to the bankruptcy court's findings and the court of appeals' decision: the grantor trust provision would not harm the Manges debtors. *Matter of Manges*, 29 F.3d 1034, 1037 (5th Cir. 1994) (Petitioner's App. at 5-6 and 60). DCRC was a "C" corporation and Manges would not be responsible for its tax liabilities. Man-Gas was a subchapter "S" corporation and the court gave Manges sufficient time to terminate his election to treat it as such and avoid any of its tax liabilities. *Id.* The fact that DCRC and Man-Gas would be left as "empty shells" is not per se improper under the Bankruptcy Code. *See Matter of Sandy Ridge Development Corporation*, 881 F.2d 1346, 1352 (5th Cir. 1989). Manges' contribution to the Trust was relatively minor ($2.3 million), while his tax attributes

were enormous (over $11 million). These facts lead to the bankruptcy court's conclusion that no significant harm will be inflicted on Manges. Accordingly, it is disingenuous to state that "the plan expressly provided that the resulting tax liability was to be satisfied by Clinton Manges personally." (Petition at 5).

A significant omission in the Manges debtors' "Statement Of The Case" is any reference to how much money SeaFirst has irretrievably spent to ensure the success of the Creditor Plan. By misrepresenting the record regarding any harm to Manges and omitting any mention of the significant investment by SeaFirst in reliance on an unstayed, confirmed plan, the Manges debtors create a false foundation for their argument.

The infirmity of their argument's foundation is further weakened by the misdirection of their argument, which goes as follows:

(1) substantial consummation of the Creditor Plan does not mandate a dismissal on mootness grounds if all five of the factors set out in *In re Chateaugay Corporation* are satisfied;

(2) only two of those five factors are of concern – whether granting the relief sought will create an unmanageable situation for the bankruptcy court and impact parties not before the court;

(3) the bankruptcy court will not be faced with an unmanageable situation because the only relief sought is to shift tax liability from Manges to the Trust; and

(4) the only parties affected will be Manges, SeaFirst, and SFA.

The Manges debtors' logic is fatally flawed. Aside from the undisputed fact that Manges will not be harmed by the effect of the grantor trust provision, the Manges debtors disregard the fact that elimination of that provision directly impacts the IRS and the Trust. Those parties have not been before the courts during this appeal. Thus, the Manges debtors cannot even satisfy the *In re Chateaugay* test.

The fact that all of the parties that would be affected by the proposed change were not before the court of appeals also distinguishes the two opinions the Manges debtors rely on to support their argument that the relief sought can be granted. *In re AOV Industries, Inc.* was a case with self-described "unusual circumstances." 792 F.2d 1140, 1141 (D.C. Cir. 1986). First, an objecting creditor subject to unequal treatment under the plan could have its treatment improved because sufficient funds were available. *Id.* at 1149, 1152-53. Second, a pending challenge to attorney fees paid to debtors' counsel could continue because counsel was on notice of the challenges throughout the proceedings and the fees could be returned to the estate for redistribution regardless of the degree of consummation. *Id.* at 1149.

The other case, *In re Chateaugay Corporation*, 10 F.3d 944 (2d Cir. 1993), is not really pertinent. Even though the court speculated that "some effective relief could be granted," *id.* at 954, it did not grant the relief sought and affirmed the lower court's decisions. *Id.* at 961.

The more important flaw in the Manges debtors' argument, however, is the supposition that fulfilling the *In re Chateaugay* factors is the ultimate test. *See, e.g., In re AOV Industries, Inc.*, 792 F.2d at 1147-48 (determinations of mootness on non-article III grounds "cannot be cabined by inflexible, formalistic rules . . . . "). In addition, the circumstances of *In re Chateaugay* are not those present here. For example, in that case provisions of a confirmed Chapter 11 plan concerning the reorganization of a conglomerate were at issue. *In re Chateaugay Corporation*, 10 F.3d at 948. Here, we have a liquidation plan proposed by and administered for the primary benefit of creditors.

The issue that is at the heart of this case and every case in which the mootness doctrine is invoked is equity. *See, e.g., In re Chateaugay*, 10 F.3d at 952 ("the mootness doctrine involves equitable considerations"). Accordingly, the Manges debtors beg the question by attempting to relegate the controversy to the issue of whether the bankruptcy court would be confronted with an unmanageable situation. The court of appeals correctly analyzed several factors and concluded that it would be inequitable to consider the merits of the Manges debtors' appeal. *Matter of Manges*, 29 F.3d at 1043-44 (Petitioners' App. at 22).

The court of appeals was consistent with other courts in recognizing that equitable considerations play a strong role in deciding whether a plan should be modified. *E.g., Matter of UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 509 (1994) ("preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to

unscramble an egg – are so plain and so compelling"); *In re Chateaugay Corporation*, 10 F.3d at 952 ("In bankruptcy proceedings, the mootness doctrine involves equitable considerations as well as the constitutional requirements that there be a case or controversy."); *Matter of Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992) ("the court may consider whether, within the facts of the case, it would be highly inequitable to reverse the bankruptcy court's order."); *In re Public Service Company of New Hampshire*, 963 F.2d 469, 473 (1st Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 304 (1992) ("The case is moot if the required relief would be either inequitable or impracticable in light of the change in circumstances."); *In re Club Associates*, 956 F.2d 1065, 1069 (11th Cir. 1992) ("The test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him."); *In re AOV Industries, Inc.*, 792 F.2d at 1147 ("Even when the moving party is not entitled to dismissal on article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits."); *In re A.J. Mackay Co.*, 50 Bankr. 756, 760 (D. Utah 1985) ("This discretion [to delete provisions the court did not have jurisdiction to confirm] must be exercised with an eye to the rights of those who may be prejudiced by modifying a plan they reasonably relied upon."). Nowhere in their Petition do the Manges debtors address the equitable issue presented in this case other than to baldly state that SeaFirst and SFA "should bear the risk of an erroneous confirmation by the bankruptcy court." Petition at 17. Fortunately, their view of equity as a one

way street leading only to their door is not accepted by the courts.

SeaFirst, SFA, and the Trust were obligated to carry out the Creditor Plan upon confirmation and so long as no stay was obtained. *See* 11 U.S.C. § 1142(a) (West 1993); *In re Riverside Nursing Home*, 137 Bankr. 134, 137 (Bankr. S.D.N.Y. 1992) ("After a Chapter 11 plan has been confirmed the debtor is required to carry out the provisions of the plan . . . . "). The proponents and the Trust have fulfilled their obligations. The court of appeals carefully reviewed the Creditor Plan, the administration of the Plan by the Trust, the failure of the Manges debtors to obtain a stay, the fact that the relief requested would not revitalize the debtors, the significant amounts of money expended by the proponents, and the adverse impact a reversal or modification would have on all creditors in the face of no benefit to the Manges debtors. Based upon all of these factors the court concluded that it would be inequitable to proceed. 29 F.3d at 1043-44 (Petitioners' App. at 22).

The Manges debtors' attempt to create a conflict regarding the court of appeals' statement in note 13 about Bankruptcy Code section 1127(b) with Judge Easterbrook's dictum about that section in the *Matter of UNR Industries, Inc.* 20 F.3d at 769. Their attempt raises at best only a false conflict. As noted above, the court of appeals' decision was grounded on more important considerations; even if it could strike the provision it would be inequitable to do so. Substantial consummation of a plan is not the *sine qua non* of mootness on appeal. Instead, "substantial consummation" is simply that point beyond which a plan cannot be modified. 11 U.S.C. § 1127(b)

(West 1993). By contrast, mootness is a much larger doctrine encompassing jurisdiction and equity based on notions of practicability and fairness, not technical considerations. *In re Public Service Company of New Hampshire*, 963 F.2d at 471.

The meaning the Manges debtors ascribe to Judge Easterbrook's statement in *UNR* is particularly suspect when viewed in the light of his statement a year earlier that: "Modification of a confirmed and substantially consummated plan is forbidden except to the limited extent 11 U.S.C. § 1127 permits." *Holstein v. Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993). Perhaps Judge Easterbrook's statements about section 1127(b) reflect the broader debate over the extent to which a court can impose minor changes of procedure as opposed to significant changes of substance. *See In re Joint Eastern & Southern District Asbestos Litigation*, 982 F.2d 721, 747 (2d Cir. 1992). Of course, the change the Manges debtors propose here is akin to amputating an arm to cure a hangnail – the reassignment of tax liabilities to the two creditors who have irretrievably invested millions of dollars to carry out the Plan in reliance on the courts' decisions.

The other authority relied on by the Manges debtors for their attack on the court of appeals' footnote reference to section 1127(b) is suspect in its logic, to wit: because section 1127(b) states the "proponent of a plan . . . may modify such plan . . . ," it only applies to proponents, not courts. *Compare In re A.J. Mackay Company*, 50 Bankr. at 760 *with Holstein v. Brill*, 987 F.2d at 1270; and *Goodman v. Phillip R. Curtis Enterprises, Inc.*, 809 F.2d 228, 234 (4th Cir. 1987) ("Under § 1127(b), post-confirmation modification can only be initiated by the proponent of a plan or a

reorganized debtor."). More germane to the court of appeals' holding here, though, is the fact that the court in *A.J. Mackay* was addressing a plan that protected a non-debtor guarantor from his creditors for which provision there was no jurisdiction. 50 Bankr. at 760. Another court has interpreted the statement in *A.J. Mackay* to mean that: "[e]ven though only the plan's proponent may file a motion to modify the plan, when the plan contains provisions that are beyond the court's jurisdiction such provisions may be stricken on a motion of one other than the proponent." *In re Davis Broadcasting, Inc.*, 169 Bankr. 229, 234 (Bankr. M.D. Ga. 1994). Of greater interest is the *A.J. Mackay* court's observation that "[b]ecause of the delicacy of the reorganization process, modifications should be allowed after confirmation only in extreme circumstances." *Id.* at 760 n.2. No "extreme circumstances" are presented by the Manges debtors and the provision at issue was within the court's jurisdiction.

Whether courts can bend section 1127 is not really the point here. Clearly, the elimination of an integral part of the Creditor Plan to the detriment of the Trust, the proponents, and other creditors is unjustified, if not prohibited. *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) ("An attack on a sale agreement that is the core and premise of a plan of reorganization is an attack on the plan itself, because the sale could not be undone without rescinding the plan . . . . "); *Matter of Specialty Equipment Companies, Inc.*, 3 F.3d 1043, 1048 (7th Cir. 1993) (Invalidating releases of bondholder class, which constituted an "integral element of the bargain represented by the Plan," in the face of substantial consummation, precluded such relief).

II.

THE COURT OF APPEALS CORRECTLY REFUSED TO REMAND THE CASE FOR THE LIMITED PURPOSE OF CONDUCTING DISCOVERY ON THE MOOTNESS ISSUE BECAUSE THERE WAS NO DISPUTE OVER THE FACTS

Focusing on their ultimate desire to somehow regain possession of the Ranch and mineral interests, the Manges debtors cavil about the court of appeals' refusal to remand the case to permit them to conduct discovery surrounding the sale of the Ranch and mineral interests. In response, the court of appeals first set the issue in its proper place: "[s]ubstantial consummation here is merely a subpart of the overall mootness balancing test . . . . " 29 F.3d at 1041 (Petitioners' App. at 16). That is the point the Manges debtors keep avoiding: the appeal is moot because requested imposition of harm on those who have relied on the unstayed Creditor Plan with no corresponding benefit to the debtors is inequitable.

The evidence concerning the sale is unequivocal. The sales agreements "fail to evidence any contingency upon the outcome of this appeal." 29 F.3d at 1042 (Petitioners' App. at 18). Included in Respondents' Appendix (A-1 through A-4) are the Declarations of the Co-Liquidating Trustee of the Trust and the officer of SeaFirst and SFA who executed pertinent agreements pertaining to the sale on behalf of the Trust, SeaFirst, and SFA. These documents were submitted to the court below along with the Sale Agreement and Ratification Agreement. These declarations under penalty of perjury positively exclude the existence of any other agreement concerning the sale.

In the face of this evidence all the Manges debtors could muster was surmise. Surmise does not create a dispute. *Cf. Contemporary Mission, Inc. v. New York Times Co.*, 665 F. Supp. 248, 269 (S.D.N.Y. 1987) ("plaintiffs must identify specific issues of material fact which are likely to be disclosed if they are granted a reasonable opportunity to pursue the additional discovery they seek."), *aff'd*, 842 F.2d 612 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988); *Automotive Wholesalers of Illinois v. National Union Fire Insurance Company of Pittsburgh, PA.*, 501 F. Supp. 1205, 1212 (N.D. Ill. 1980) (bare hope or suspicion that party will uncover something is insufficient to defeat a motion for summary judgment). In the *Huddleston* opinion relied upon by the Manges debtors, the court merely permitted the opposing party to submit counteraffidavits. *Huddleston v. Nelson Bunker Hunt Trust Estate*, 102 Bankr. 71, 77 (N.D. Tex. 1989). After submission of the counteraffidavits, the district court would determine whether a resolution of "controlling disputed facts" was necessary. *Id.* If so, the district court would remand that matter to the bankruptcy court for resolution. *Id.* In the *In re Hamady Brothers Food Markets* opinion cited by the Manges debtors, there was a genuine dispute over controlling fact issues. 110 Bankr. 815, 818 (E.D. Mich. 1990). The Manges debtors did not submit any affidavits and have not raised any genuine dispute.

Since the sale of the Ranch and mineral interests did not necessarily control the determination that it would be inequitable to grant the relief requested and there was no dispute over the finality of the sale in any event, the court of appeals correctly denied the Manges debtors another opportunity to inflict more delay and expense on their

creditors. The decision of the court of appeals is not in conflict with any other court and is consistent with the accepted and usual course for similar judicial proceedings.

III.

DISMISSAL OF THE CASE UNDER THE CIRCUMSTANCES WAS CONSISTENT WITH LONG STANDING LEGAL PRINCIPLES AND DID NOT VIOLATE THE DUE PROCESS PRINCIPLE OF "FUNDAMENTAL FAIRNESS" OR THE "FRESH START" POLICY OF THE BANKRUPTCY CODE

The third approach the Manges debtors use in attempting to convince this Court that their petition should be granted is the most feeble. After six opportunities to convince the courts below that they were entitled to a stay, the Manges debtors argue that they have been denied due process. Here, they beg the Court's indulgence on the ground that the consequences of their failure to meet the requirements for a stay pending appeal requires that this Court create an exception similar to the "capable of repetition yet evading review" exception to the mootness doctrine. Petition at 16.

The first problem with this argument is that the Manges debtors lack standing to voice the imagined complaints of others who find themselves similarly situated. The Manges debtors have not even argued that they again will be "required to run the gauntlet" of seeking stays pending appeals of future bankruptcy cases. *See DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). Consequently, the issue is certainly not capable of repetition so far as the Manges debtors are concerned. *Id.*

Aside from their lack of standing to invoke a "capable of repetition yet evading review" exception to the mootness doctrine, is a more important oversight. The Manges debtors are asking that the Court overturn the long accepted wisdom of permitting appropriate bankruptcy plans to go forward even though appellate review may be extinguished. *See, e.g., In re Public Service Company of New Hampshire,* 963 F.2d at 471-72 ("important public policy favoring orderly reorganization and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court.' ").

The problem the Manges debtors have consciously ignored throughout this long process is that once they invoked the protection of the Bankruptcy Code, the interests of their creditors became paramount. *See Matter of Texas Extrusion Corp.,* 844 F.2d 1142, 1159 (5th Cir. 1988). The bankruptcy court and district court carefully considered the motions for stays pending appeal. That relief was denied for good reasons. The bankruptcy court summed it up quite concisely: these bankruptcies have run their full course. Appendix at A-5.

Next, the Manges debtors argue they have been denied a "fresh start" even though almost $80 million of their liabilities have been discharged. Resorting to the totally unfounded suggestion that they face "hundreds of thousands of dollars in tax liability" (Petition at 17) only emphasizes again the infirmities of their argument. The uncontroverted evidence below is that there should not be any significant post-confirmation income tax liability to Manges. (Petitioners' App. at 60). The bankruptcy court noted in rejecting their motion for a stay that "even the debtors will benefit from the resolution of the debts

satisfied by the plan." Appendix at A-8. If they have to suffer some future inconvenience, they have only themselves to blame. After all, the "fresh start" to which they are entitled extends only to relief from the oppressive debts incurred prior to bankruptcy, but does not relieve them of every conceivable disability incurred as a result of bankruptcy. *See In re Dabney*, 3 Bankr. 719, 720 (E.D.N.Y. 1980).

CONCLUSION

For the foregoing reasons, Respondents Seattle-First National Bank and SeaFirst America Corporation request (1) that the Court deny Petitioners Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors' petition for writ of certiorari or (2), in the alternative, if it grants certiorari, that it affirm the opinion and judgment of the Fifth Circuit Court of Appeals on the merits.

Respectfully submitted,

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No. 94-1111

In The

Supreme Court of the United States

October Term, 1994

CLINTON MANGES, DUVAL COUNTY RANCH COMPANY, AND MAN-GAS TRANSMISSION COMPANY, DEBTORS,

Petitioners,

v.

SEATTLE-FIRST NATIONAL BANK AND SEAFIRST AMERICA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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DECLARATION OF WILLIAM R. SPENCER

STATE OF WASHINGTON §
§
COUNTY OF KING §

I, WILLIAM R. SPENCER, hereby declare as follows:

1. I am a Vice-President of Seattle First National Bank ("**SeaFirst**") and the President of SeaFirst America Corporation ("**SFA**"). My business address is 800 Fifth Avenue, Floor 29, Seattle, Washington 98124.

2. I am over the age of eighteen years and am fully competent to make this declaration. I have relied upon personal knowledge and information provided me by my agents in compiling the facts stated herein.

3. On December 8, 1993, I executed on behalf of SeaFirst and SFA (collectively, "**SeaFirst**") the Ratification Agreement that is attached to this declaration as Exhibit 1. Exhibit 1 is a true and correct copy of the Ratification Agreement signed by me on behalf of SeaFirst.

4. Other than the Ratification Agreement, SeaFirst has no other agreements, contracts, or understandings with Radcliffe Killam and Sue Spivey Killam, Tenants for a Term Certain with ROS.01/01/89, a Complex Trust, or with Killam Investments, a Texas general partnership (collectively, "**Killam**"), that concern, relate to, or are connected in any way with the sale, transfer, assignment, or conveyance by the Manges Liquidating Trust ("**Trust**") of the Duval County Ranch, any mineral interests or properties thereunder, or any other property or asset of the Trust. The Ratification Agreement represents the only

agreement, contract, or understanding between SeaFirst and Killam relating to the sale, transfer, assignment, or conveyance by the Trust of any Trust property or asset.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 3, 1994.

/s/ William R. Spencer
WILLIAM R. SPENCER

DECLARATION OF JOHN HEMSTREET

STATE OF WASHINGTON §
§
COUNTY OF KING §

I, JOHN HEMSTREET, hereby declare as follows:

1. I am the Co-Liquidating Trustee of the Manges Liquidating Trust ("**Trust**"). My business address is 800 Fifth Avenue, Floor 29, Seattle, Washington 98124.

2. I am over the age of eighteen years and am fully competent to make this declaration. I have relied upon personal knowledge and information provided me by my agents in compiling the facts stated herein.

3. Effective July 16, 1993, I executed on behalf of the Trust the Real Estate Exchange and Sale Agreement (**"Sale Agreement"**) that is attached to this declaration as Exhibit 1. Exhibit 1 is a true and correct copy of the Sale Agreement signed by me on behalf of the Trust.

4. Exhibit 2 is a true and correct copy of a Notice to Purchasers Duval County Conservation and Reclamation District.

5. Other than the Sale Agreement, Exhibit 2, and the covenants and agreements contained in the deeds and assignments on file in the Official Public Records of Duval and Webb Counties, Texas, (which are attached as exhibits to Appellees' January 18, 1994 Appendix to Cross-Appellants' Reply Brief) the Trust has no other agreements, contracts, or understandings with Radcliffe Killam and Sue Spivey Killam, Tenants for a Term Certain with ROS.01/01/89, a Complex Trust, or with Killam

Investments, a Texas general partnership (collectively, "**Killam**"), that concern, relate to, or are connected in any way with the sale, transfer, assignment, or conveyance by the Trust of the Duval County Ranch, any mineral interests or properties thereunder, or any other property or asset of the Trust.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 1994.

/s/ John Hemstreet
JOHN HEMSTREET
Co-Liquidating Trustee
Manages Liquidating Trust

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE DUVAL COUNTY RANCH COMPANY DEBTOR	§ § § § § §	NO. 89-01286-C-11
MAN-GAS TRANSMISSION COMPANY DEBTOR	§ § § § §	NO. 89-01532-C-11
CLINTON MANGES, DEBTOR	§ § §	NO. 89-01531-C-11

ORDER DENYING EMERGENCY MOTIONS
FOR STAY PENDING APPEAL

On the 10th day of June, 1991, this Court considered the Emergency Motion for Stay Pending Appeal of the "Order Confirming First Amended Creditors' Plan of Reorganization of Seattle First National Bank and SeaFirst America Corporation" ("**Confirmation Order**"), filed by Debtors Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company. After counsel for the debtors were informed of this Court's execution of a corrected order confirming the Creditor Plan ("**Corrected Order**"), an oral motion to allow the Emergency Motion for Stay Pending Appeal to apply to the Corrected Order was made, and such motion was granted. Accordingly, this order disposes of both the Emergency Motion for Stay Pending Appeal as originally filed as well as an emergency motion for stay of the Corrected Order.

The Court, after receiving proffers of testimony from the debtors, reviewing the Emergency Motion for Stay Pending Appeal and the brief filed in support thereof, and hearing the arguments of counsel for the debtors, and of counsel for creditors Seattle-First National Bank, SeaFirst America Corporation, Law Offices of Royal D. Adams, P.C., and certain of the ad valorem taxing authorities, declines to stay either the Confirmation Order or the Corrected Order for at least the following reasons:

1) The debtors have failed to demonstrate either a likelihood of success on the merits of their appeal or the existence of significant legal issues for presentation in that appeal. Specifically:

a) In the event the Creditor Plan were not confirmed, there exist in these cases overwhelming grounds for removal of the automatic stays protecting the debtors' assets. Since foreclosure on these assets by secured creditors would leave little, if anything, for distribution to the administrative and unsecured claimants, confirming a plan that offers all parties the opportunity to receive some recovery is fair and equitable.

b) The Court believes that the financial strength of the proponents of the Creditor Plan and the existing assets of the Proponents dedicated to its consummation demonstrate that the liquidation will be successful.

c) A review of the applicable law indicates that the Creditor Plan calls for the creation of a grantor trust, and that there will be no federal tax consequences flowing from the creation and operation of the trust. In addition, the Internal Revenue Services' knowledge of and participation in these proceedings binds them to this

Court's findings and conclusions regarding the grantor trust.

d) Helen Ruth Manges had knowledge of the confirmation of the Creditor Plan. No property interests owned by her will be affected by the plan. She has no homestead right and has made no homestead claim to any estate property other than a 200-acre tract in which a prior judicial determination declared that she had no homestead.

e) This Court had jurisdiction to affect the property of the estate, including the jurisdiction to take such acts as may effectively moot appeals currently pending before the Fifth Circuit Court of Appeals.

f) There is no homestead in favor of any person on any of the property owned by the estates of these debtors. The finding of no homestead is supported by final judicial determinations by the United States District Court for the Western District of Texas and by the evidence received by this Court at the confirmation hearings on the Creditor Plan.

g) Substantive consolidation is proper, fair and supported by the evidence presented to the Court.

h) None of the amendments to the Creditor Plan presented by the Proponents at the confirmation hearings are material, and none of them adversely affect any party who voted in favor of confirmation.

2. The debtors have failed to demonstrate any irreparable harm that would result to them if the stay is

not granted. All of the debtors are insolvent, and forestalling the effectuation of the Creditor Plan will not work to the benefit of any of the parties in these cases: even the debtors will benefit from the resolution of the debts satisfied by the plan.

3. Substantial harm to others will result if the stay is granted. The unsecured creditors will receive nothing if the Creditor Plan is not effectuated: if the plan were not confirmed, ample grounds existed for the lifting of the stays and the allowance of foreclosure by the secured creditors. Moreover, all secured creditors have voted for the plan, and would accordingly be harmed if its effects were stayed. Payments to the ad valorem taxing authorities would not be made if a stay were granted, resulting in yet further delays in recovery by their respective schools and governments of taxes dating back over ten years.

4. No public good would be served by the issuance of a stay pending appeal. There is a substantial public policy being served when a plan is confirmed by an overwhelming majority of the voting creditors. A further interest is accommodated by the conclusion of bankruptcy proceedings that have pended for over twenty months, particularly when the conclusion satisfies creditors whose debts are almost ten years past due. It is the opinion of this Court that these bankruptcies have run their full course. The debtors were given full opportunity to present a confirmable plan to the Court and the creditors. When they presented a plan, it was neither accepted by the majority of creditors nor confirmed by this Court. The subsequent Creditor Plan was the only confirmable plan presented to this Court. While this Court recognizes

that a stay pending appeal may issue from the district court, it likewise recognizes that no apparent good would be served by furthering the liquidation of these debtors and would, if such stay is granted, entertain the pending motions to lift the stays to allow the secured creditors to foreclose, leaving the unsecured creditors and administrative claimants with very little chance of recovery.

In view of these findings and conclusions:

IT IS ORDERED that the Emergency Motion for Stay Pending Appeal of this Court's Confirmation Order filed by the debtors in these cases be, and the same hereby is DENIED; and, it is

FURTHER ORDERED that the oral emergency motion for stay pending appeal of this Court's Corrected Order be, and the same hereby is DENIED; and, it is

FURTHER ORDERED that all other relief not specifically discussed herein be, and the same hereby is DENIED.

SIGNED and ORDERED ENTERED this date: June 28, 1991

/s/ Richard S. Schmidt
RICHARD S. SCHMIDT
UNITED STATES .
BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE: DUVAL COUNTY RANCH COMPANY, CLINTON MANGES, AND MAN-GAS TRANSMISSION CO.	§	MISC. NO. C-91-23
V.	§	
SEATTLE FIRST NATIONAL BANK AND SEAFIRST AMERICA CORP., ET AL.	§	

ORDER DENYING MOTION FOR STAY PENDING APPEAL

(Filed July 16, 1991)

Debtors Duval County Ranch Company, Clinton Manges, and Man-Gas Transmission Co. appeal the confirmation by the Bankruptcy Court of the First Amended Creditors' Reorganization Plan ("the Plan"). Debtors move for a stay of the implementation of the Plan.

After a hearing on the merits of this motion, this Court denies debtors' motion for stay. This Court will supplement this Order with findings of fact and conclusions of law.

This Court grants to debtors leave for interlocutory appeal of this Order.

ORDERED this 15 day of July, 1991.

/s/ Hayden W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
DUVAL COUNTY RANCH COMPANY, CLINTON MANGES, AND MAN-GAS TRANSMISSION COMPANY	§ § § § § §	MISC. NO. C-91-23

MEMORANDUM IN SUPPORT OF ORDER DENYING MOTION FOR STAY PENDING APPEAL

(Filed July 26, 1991)

On July 12, 1991, this Court denied the motion by debtors Duval County Ranch Company, Clinton Manges, and Man-Gas Transmission Company ("debtors") for a stay pending appeal of the bankruptcy court's Order Confirming First Amended Creditors' Plan of Reorganization and the corrected order confirming the Plan. The denial followed a hearing at which the Court heard testimony, considered documentary evidence, and heard the arguments of counsel for various parties.

This memorandum contains findings of fact and conclusions of law in support of the Court's oral order denying the motion issued on July 12, 1991, and the written order denying the motion issued on July 15, 1991.

FINDINGS OF FACT

This Court finds the following facts:

1. Duval County Ranch Company ("DCRC") filed its voluntary petition in these proceedings for relief

under Chapter 11 of the United States Bankruptcy Code on August 14, 1989.

2. Clinton Manges ("Manges") and Man-Gas Transmission Company ("Man-Gas") were made the subjects of separate involuntary petitions for relief under Chapter 11 of the United States Bankruptcy Code filed on October 2, 1989.

3. On or about January 29, 1991, Seattle-First National Bank ("Bank") and SeaFirst America Corporation ("SeaFirst America") (together, "the proponents") filed the Creditor Plan and their First Amended Original Disclosure Statement to First Amended Original Creditors' Plan of Reorganization ("Disclosure Statement").

4. The bankruptcy court approved the Disclosure Statement as containing adequate information under 11 U.S.C. § 1125 in an Order Approving Disclosure Statement and Fixing Time for Filing Acceptances and Rejections of Plan, Combined with Notice Thereof ("Disclosure Statement Order) dated March 11, 1991. The Disclosure Statement Order contained certain modifications to the Creditor Plan that were approved by the bankruptcy court.

5. A copy of the Creditor Plan, the Disclosure Statement, the Disclosure Statement Order, and court-approved ballots were transmitted to all persons requiring notice in compliance with the Disclosure Statement Order and the Bankruptcy Rules.

6. The Creditor Plan was accepted in writing by the creditors and equity security holders whose acceptance was required by law. Specifically, classes 3, 5, 6, 7, 8, 9, 10,

17, and 18 were impaired and accepted the Plan, without considering the votes of insiders.

7. The proponents requested confirmation of the Creditor Plan under the cramdown provisions of 11 U.S.C. § 1129(b).

8. As of the date of the initial hearing on confirmation, no class of secured creditors rejected the Plan.

9. On May 1, 13, and 20, 1991, evidentiary hearings were held before the Honorable Richard S. Schmidt, United States Bankruptcy Judge for the Southern District of Texas, on confirmation of the Plan.

10. On May 29, 1991, Judge Schmidt heard oral arguments on confirmation of the Plan.

11. On May 31, 1991, Judge Schmidt signed the Confirmation Order.

12. On June 7, 1991, Judge Schmidt signed the Corrected Order, which was effective *nunc pro tunc* as of May 31, 1991.

13. Also on June 7, 1991, the debtors filed an Emergency Motion for Stay Pending Appeal of the Confirmation Order and the Corrected Order ("bankruptcy court stay motion").

14. On June 10, 1991, Judge Schmidt conducted a telephonic hearing on the bankruptcy court stay motion.

15. Also on June 10, 1991, Judge Schmidt orally denied the bankruptcy court stay motion, and on June 28, 1991, signed an order denying the bankruptcy court stay motion.

16. On June 17, 1991, the debtors filed their Second Notice of Appeal, in which they appealed Judge Schmidt's Confirmation Order and Corrected Order to this Court.

17. Also on June 17, 1991, the debtors filed their Emergency Motion for Stay Pending Appeal ("district court stay motion"), and requested from this Court an immediate telephonic hearing on the issuance of a temporary stay of the Confirmation Order and the Corrected Order pending full evidentiary hearing on the district court stay motion. This Court held that hearing on June 17, 1991. At the conclusion of the telephonic hearing, this Court declined to issue a temporary stay.

18. On July 12, 1991, a hearing after notice to all parties was held on the district court stay motion. Though given due notice of the hearing, counsel for Man-Gas refused or failed to appear.

19. At the hearing, the Court heard testimony from Manges; David D. Towler, III, counsel for The Law Offices of Royal D. Adams, P.C.; Gary Williams, the liquidating trustee appointed under the Plan ("liquidating trustee"); and Dr. Dannah Procter, Interim Superintendent of the Freer Independent School District.

20. Based upon the testimony received by the Court, the pleadings, the documents and exhibits introduced at the hearing, as well as the matters presented to the Court from the bankruptcy court's record by judicial notice, the Court finds the following:

a) By the voting deadline, 127 ballots were cast by non-insider creditors in connection with the Plan.

b) Of the ballots cast by non-insiders, 120 creditors holding approximately $78,969,277 in claims accepted the Plan.

c) These acceptances represented 94.5% of the voting non-insiders and 99.74% of the claims of voting non-insiders.

d) By the initial hearing on confirmation, all secured creditors who voted, including Freer, Benavides, and Webb County Independent School Districts and Duval County, had accepted the Plan

e) The debtors have not paid ad valorem taxes for the years 1977-1979 and 1982-1990, though debtors may have paid some portion of their 1982 taxes. The proponents paid the ad valorem taxes for 1990.

f) In the bankruptcy court, the debtors did not place a value on pending adversary proceedings to which they were parties.

g) No debtor or debtor dependent properly claimed a homestead interest in any of the property of the bankruptcy estate.

h) The debtors presented no evidence of a homestead claim by any person.

i) Helen Ruth Manges had actual knowledge of the Plan.

j) Helen Ruth Manges did not object or appear at the Plan confirmation hearings.

k) The debtors have not shown evidence of any surety or bond.

l) Title to bankruptcy estate property has been conveyed to the liquidating trustee.

m) The liquidating trustee has hired a manager for the 99,000-acre Duval County Ranch ("Ranch"). The ranch manager has begun repairing fences, water systems, and houses on the Ranch.

["n)" and part of "o)" missing in original]

debtors. The operator has begun reworking and operating the wells.

p) The liquidating trustee has collected or obtained control over personal property of the debtors' estates.

q) The Bank is paying casualty insurance coverage on the Ranch.

r) The liquidating trustee is in the process of collecting money held in suspense by purchasers of oil and gas.

s) The collections by the liquidating trustee will be supplemented, if necessary, by the Bank to make a $750,000 payment to the ad valorem taxing authorities within the next several weeks.

t) The Freer I.S.D. already has budgeted approximately $330,000 of that $750,000.

u) The Freer I.S.D. has had to reduce teacher and other employee salaries, educational programs for students, and maintenance of school property as a result of insufficient tax revenue.

v) If the stay were granted, the liquidating trustee is uncertain how maintenance, security and operation of the estate property would be financed, or how the current expenses would be paid.

w) Manges is the sole shareholder of DCRC and also is the sole shareholder of Man-Gas.

x) Manges estimates that it will take the liquidating trustee two to three years to sell the Ranch and the mineral estate.

y) The debtors did not challenge the foreclosure sale of the Maverick County Ranch until after the purchase by Winn Exploration Company.

z) David D. Towler, III has represented the debtors in pre-bankruptcy matters and has continued to represent Helen Ruth Manges in various legal matters.

aa) David D. Towler, III clearly is biased in favor of debtors.

bb) The creditors have lost large amounts of money during the time the debtors have been litigating.

21. After a review of those findings of fact issued by Judge Schmidt on June 7, 1991, relating to the issues raised in the district court stay motion and at the hearing thereon, the Court finds that Judge Schmidt's findings are not clearly erroneous.

CONCLUSIONS OF LAW

1. Movants seeking a stay must show the following:

a) that they are likely to succeed on appeal, or that there is a substantial question whether the decision of the bankruptcy court will stand on appeal;

b) that without the stay, movants will suffer irreparable harm;

c) that the stay will not cause substantial harm to others; and

d) that the stay will not disserve the public interest. *Ruiz v. Estelle,* 650 F.2d 555 (5th Cir. 1981).

2) Like an injunction, a stay pending appeal is an extraordinary remedy and should be granted sparingly. *Atlantic Richfield Co. v. FTC,* 298 F.Supp. 1, 17 (S.D. Tex. 1975), *aff'd,* 546 F.2d 646 (5th Cir. 1979).

3) The debtors have failed to demonstrate either a likelihood of success on the merits of their appeal or the existence of significant legal issues for presentation on appeal. Specifically:

a) in the event the Plan had not been confirmed, there existed in these cases grounds for removal of the automatic stays protecting the debtors' assets. Since foreclosure on these assets by secured creditors would have left little, if anything, for distribution to the administrative and unsecured claimants, confirmation of a Plan that offered all parties the opportunity to receive some recovery was fair and equitable.

b) Helen Ruth Manges had knowledge of the confirmation of the Plan. She owns no property interests affected by the Plan. She has made no homestead claim to any estate property.

c) The bankruptcy court's finding of no homestead right by any person on the property of the debtors' estates is supported by final judicial determinations by the United States District Court for the Western District of Texas and by

the evidence received by the bankruptcy court at the confirmation hearings on the Plan.

d) Insufficient evidence has been presented to conclude that there is any value to the estates in any of the adversary proceedings.

4. The debtors have failed to demonstrate any irreparable harm that would result to them if the stay is not granted. All of the debtors are insolvent, and forestalling the effectuation of the Plan will not benefit any of the parties.

5. Substantial harm to others will result if the stay is granted. It is probable that the unsecured creditors will receive nothing if the Plan is not effectuated because the bankruptcy court may well lift the stays and allow the secured creditors to foreclose. The debtors have failed to produce sufficient surety for bond pending appeal, and have offered only speculation about their ability to do so. If the Plan were stayed, the taxing authorities would not receive the $750,000 that the liquidating trustee is required by the Plan to pay them within a few weeks. The debtors admitted that they will offer no protection against the immediate losses that the taxing authorities would suffer.

6. No public good would be served by the issuance of a stay pending appeal. On the other hand, public policy definitely favors the immediate partial payment of the large tax debt owed to the ad valorem taxing entities such as schools. Public policy also favors execution of a Plan confirmed by an overwhelming majority of the voting creditors. Public policy is also served by concluding a

bankruptcy proceeding that has lasted as long as this one has.

CONCLUSION

The Court denies the motion for stay pending appeal of the bankruptcy court's Order confirming the Plan.

ORDERED this 25 day of July , 1991.

/s/ Hayden W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES
DISTRICT JUDGE